90-1621

NO._____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

VIRGINIA KNIGHT; EDMUND G. BROWN; WILSON RILES; RICHARD NEVINS; HOUSTON I. FLOURNOY; HAROLD J. POWERS,
Petitioners,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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1. Whether the Contract Clause of the Federal Constitution limits the right of a state by Constitutional amendment to substantially impair the retirement benefits of a public employee after he has fully rendered his called for services?

2. Whether a retiree under a public defined benefit retirement system has a vested right to the specific formula provided for benefits in his employment contract during his required years of service irrespective of the governmental entities' funding mechanism?

3. Whether under the strict scrutiny doctrine, the impairment of retirees' basic retirement allowances by Constitutional amendment is a denial of equal protection and due process?

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April 19, 1991

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

Petitioners Virginia Knight, Edmund G. Brown, Wilson Riles, Richard Nevins, Houston I. Flournoy, and Harold J. Powers pray that this Court issue a writ of certiorari to the Court of Appeal of the State of California Third Appellate District ("Court of Appeal") to review the opinion and judgment of that court entered on September 4, 1990.

OPINIONS BELOW

The order of the California Supreme Court denying review is not reported and is reprinted at Appendix C, 226c. The Order of the Court of Appeal denying a rehearing is reprinted at Appendix B, 225b. The Court of Appeal took original jurisdiction holding that retirees' basic pension benefits are not vested contractual rights protected by the federal

Contract Clause. The opinion was reported at 223 Cal.App. 3d 527, 273 Cal.Rptr. 120 and is reprinted at Appendix A, 1a.

JURISDICTION

The Court of Appeal entered its opinion on September 4, 1990, and denied a rehearing on October 1, 1990. The California Supreme Court entered its order denying review on December 20, 1990. On March 6, 1991, Justice Sandra Day O'Conner extended until April 19, 1991, petitioners' time for filing a petition for a writ of certiorari. This Courts' jurisdiction is invoked under 28 U.S.C. Section 1257 (a).

FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, Sec. 10, cl 1:

"No State shall pass any . . . Law impairing the Obligation of Contracts. ."

U.S. Constitution, Am. XIV, sec. 1:

". . . No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Art. III, Sec. 7:

Art. III, Sec. 7 was a legislative Constitutional amendment passed by the people of California on November 4, 1986 as Proposition 57 which converted petitioner retirees' basic fluctuating retirement allowances to fixed allowances. Its text is set forth in full at App. D, 228d and App. A, 39a. Other pertinent parts of the Legislators' Retirement Law ("LRL"), are set forth at App. E, 231e.

STATEMENT OF THE CASE

Petitioner Virginia Knight is the widow of Goodwin J. Knight who served as

Lt. Gov. from 1947-1953 and as Governor from 1953-59. Edmund G. Brown served as Attorney General from 1951-1959, and as Governor from 1959-1967. Wilson Riles served as Superintendent of Public Instruction from 1971-1983. Richard Nevins served on the Board of Equalization from 1959-1987. Houston I. Flournoy served in the Legislature from 1961-1967, and as Controller from 1967-1975. Harold J. Powers served in the Legislature from 1933-1953, and as Lt. Gov. from 1953 to 1959. The Constitutional officers, and all others directly impacted by the decision herein were first elected prior to March 4, 1972. A list of all such persons, offices held, their dates of service, and years of credited service was set forth in the Knight Petition for Writ of Mandate, App., Exhibit A, 41.

The pension contract between Cali-

fornia and its Constitutional Officers is set forth primarily by statute in the form of the Legislators' Retirement Law. (Gov. Code[1], Sections 9350, et seq., Originally enacted in 1947 for the benefit of legislators (Stats., ch. 879, sec. 1, pp. 2058-2065), it was amended in 1949 to permit Constitutional officers, except judges, to participate in its benefits (9355.4). The LRL has been amended frequently just as all other public retirement systems have been.

The LRL established a Legislators' Retirement System ("LRS"), a defined benefit plan, under the general administrative authority of respondent Public Employees' Retirement System ("PERS"). (Sec. 9350.2, 9350.3, 9353.) Any Consti-

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1. All further statutory references are to the California Government Code unless expressly stated.

tutional officer could file an election to participate at any time during incumbency. (Sec. 9355.) Members could not participate in any other retirement system. (Sec. 9355.5.) The Controller was required to deduct 4% for members first elected before March 4, 1972 from any member's paycheck as a contribution to the System and forward that sum to PERS for deposit in the Legislators' Retirement Fund ("LRF") in the State Treasury. (Sec. 9354 (App E, 231e), 9357, 9357.01, 9357.15.) From its inception, the State also appropriated annually substantial contributions to the LRF. (App. F, 237f.)

When the petitioners and beneficiary Knight's husband served as Constitutional Officers, they were advised by PERS that as a part of their compensation they each had the right to participate in and benefit from the LRS. Each voluntarily

elected to participate in the system, assuming its burdens and its benefits. A member attaining age 60 credited with four or more years of service was eligible to retire and "thereafter receive for life the retirement allowance provided by the LRL." Sec. 9359, App. E, 231e.

The petitioners' retirement allowances were calculated in accordance with former 9359.1(b) (App. E, 232e) based on a percentage of the compensation payable to the incumbent officer the retired member last held, five percent of the salary base per year of credited service up to eight years (40%), and sixty percent of the salary base for officers with twenty-four or more years of service. This base sum is modified actuarially if any provision is made for a surviving spouse 9361.3 or 9361.4. App., 236e). Such a binding election was made by each

retiree prior to receiving his first retirement allowance. 9361.1, App, 236e.

In 1963, the Legislature improved the benefits in most of California's State public retirement systems due to economic circumstances including the LRS. In that year, 9360.9 (App. 234e) was added which required automatic annual adjustment of LRS' pension benefits to reflect upward changes in the cost of living using 1954 as the base year. The increased benefit was expressly applicable "to all allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964." Thus, this benefit became a part of Knight and Powers' retirement benefits after their rendition of service. In 1966, 9360.10 was added which provided an annual cost of living adjustment using the date of retirement as the base year.

The cost of living adjustment is pursuant to 9360.9 for Constitutional officers first elected prior to January 1, 1966, and pursuant to 9360.10 for those first elected after January 1, 1966.

When the LRL was enacted, 9358 provided:

> 9358. The State **SHALL** contribute annually to the Legislators' Retirement Fund, an amount, as estimated by the Board of Administration, equal to so much of the benefits to be paid from the fund during that year as is not provided by the accumulated contributions of the members receiving such benefits. (Emphasis added.)

Section 9358.1 provided:

> 9358.1. The provisions of 9358 do not constitutue an appropriation of money from the State Treasury. The sum required for state contributions **SHALL BE APPROPRIATED** in each State Budget Act, **OR OTHERWISE.** (Emphasis added.)

A second paragraph provided for adjustments in cases of prior overpayments or underpayments. The history of

the LRS is discussed in some detail in Knight's Supplemental Brief, pages 5-9 and A.C. Brief, pp. 1-16. In summary, largely in response to the 10 years of study and hearings by Congress preparatory to the passage of ERISA in 1974, the Legislature moved toward actuarial funding about 1972 with this and the other State defined benefit plans. 9358.5 added in 1972 required that after January 1, 2002, the LRS be fully funded and actuarily sound. In order to place the LRF on a reserve fund basis, the Legislature appropriated $29,380,775.15 during fiscal year 1977-1978. At the same time they repealed 9358.1 and 9358.5 and amended 9358 to provide for an annual contribution of 18.81% of compensation paid members on a

continuing monthly appropriation basis.[2]

Annual earnings from investments of the LRF now exceed the annual benefits paid. For example, the total investment income for the Fund in 1988-1989 was $4,242,358.81 with total benefit expenditures of $4,066,427.35. The total income

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2. The Enrolled Bill Report of SB 613 dated 9/15/77, Exhibit "C" of Flournoy's Supplemental Brief provides as follows:

SPECIFIC FINDINGS AND DISCUSSIONS:

Current law requires the LRS to be fully funded and actuarially sound by the year 2002. A recent (February 1977) actuarial valuation of the LRS found the unfunded liabilities of the system to be some $28.6 million as of June 30, 1976.

Such liabilities were for (1) already retired members, (2) persons who are no longer active members but who left their money on deposit to recive a benefit upon reaching the age of eligibility and (3) benefits accrued as of June 30, 1976 for active members. The 1977-78 Budget appropriating some $29 million to fund the cost of all three portions of the unfunded liabilities. However, the cost benefits accruing after June 30, 1976 have not been funded. The 18.81 percent contribution rate in the bill would fully fund those benefits according to the latest actuarial data available. (Emphasis added.)

for the year was $5,638,632.66; $1,572,205.31 more than the total benefits expended as shown by the latest LRS Annual Report. App. F, 239f.

Historically, California Constitutional officers have been notoriously underpaid which is frequently true of public officials. In 1983, 11551, 11551.5, and 11552.5 were amended which raised the annual salary of the statewide Constitutional officers substantially effective January 5, 1987. Pursuant to Art. V, sec. 12 of the State Constitution, the statewide officers did not receive an immediate increase because they could not receive an increase in pay during a term of office. Therefore, retirees' basic retirement allowance was not to be adjusted until January, 1987. The members of the Board of Equalization are not so limited, and their salary or

retirement allowance was increased by the same 1983 legislation in 11552(t) effective January 1, 1984. The 1983 amendments would raise the governor's salary from $49,100 to $85,000. The salary of the Board of Equalization and many other State officers and Directors was set at $68,000 in 1983 by 11552 plus an annual cost of living increase in 1983 commencing each July 1. The salary of the board members had increased annually based on the 1983 legislation to $82,007 on July 1, 1986 and $85,405 by July 1, 1988. The retirees of the Board of Equalization had had their basic retirement allowances increased July, 1984, 1985 and 1986 pursuant to the 1983 amendments.

The 1983 salary increase for the statewide officers went into effect January, 1987 with no cost of living increment. The Governor's salary was

still $85,000 while the salary of the members of the Board of Equalization had risen from $68,000 in 1983 to $82,007. There would have been a cost of living increment pursuant to 11551, 11551.5 and 11552.5 between 1987 and 1991 in January, 1991, but these sections have been supplanted by Proposition 112 passed by the electorate June, 1990. Currently, salaries are set by a Citizen's Commission.

The 1983 salary increase for the statewide incumbents effective January, 1987, would have increased retirees' basic pension allowance substantially. In order to prevent such increases, the legislature submitted Propostion 57 to the electorate November 4, 1986 which sought to change petitioners' basic pension allowances from a fluctuating to a fixed allowance. It provided that neither the retirement allowance of a

member or beneficiary of a former Constitutional officer should be increased or affected in any manner by changes on or after November 5, 1986, in the compensation payable to the incumbent. The stated purpose of the Proposition was to prohibit "windfalls and unforeseen advantages." App. D, 228d.

There were no offsetting benefits of any kind in conjunction with this attempted substantial impairment of petitioners' contractual rights converting a "fluctuating" allowance to a "fixed" allowance. Although demand was made by some of the retirees, PERS has adjusted no allowance since November 5, 1986, due to the passage of Proposition 57. [3]

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3. In January, 1987, PERS notified petitioners as follows: "As you know, we historically adjusted your monthly benefit under (LRS) to reflect increases in the incumbent's salary. . . Proposition 57 prohibits us from recalculating your benefit whenever the incumbent's salary is increased.

HOW THE FEDERAL QUESTIONS WERE RAISED

Petitioners Flournoy and Powers filed their Petition for Writ of Mandate in Court of Appeal (C005622) for relief from the application of Art. III, Sec. 7 on the basis it was not intended to apply to any officer, such as they, who had also served as a legislator; and the application of Proposition 57 to their retirement allowances is an impairment of their employment contract contrary to the Federal Constitution, a violation of the Fourteenth Amendment, and contrary to all California decisional law in this field.

Petitioners Knight, Brown, Riles and Nevins filed their Petition for Writ of Mandate in Court of Appeal (C005934) seeking its orders to recalculate their

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.Continued...

Thus, your monthly allowance may not be adjusted by any future salary increase.
(Knight Petition, Exh. E, 48).

basic retirement allowances in accordance with the formula provided in 9359.1 as it read during their rendition of service. The application of Art. III, sec. 7, purporting to change retirees' basic retirement allowances from a fluctuating to a fixed basic pension impermissibly impaired their vested contractual rights under the Contract Clause of the federal Constitution and the 14th Amendment.

The Court of Appeal issued alternative writs of mandate to consider the claims. Thereafter the cases were consolidated. PERS responded that their was no violation of petitioner's vested contractual rights; petitioners had only a vested right to a "reasonable and substantial" retirement allowance rather than to the specific statutory benefits in the law when they rendered their service or after acquired benefits under

9360.9. PERS does not claim that Proposition 57 was necessary to preserve or protect the pension program; nor that the State would have difficulty in meeting its obligations.

The Court of Appeal requested supplemental briefing addressing the question whether a contractual right to a specific formula for the calculation of pension benefits can be obtained where the Legislature has expressly refused to provide an appropriation to support the payment of such benefits. App. G, 240g. The opinion is replete with references to the Contract Clause and states: . . . "Accordingly, petitioners must make their claim under the federal Constitution, specifically the contract clause contained in article I, section 10." App. 47a.

DECISION COURT OF APPEAL

Court denied the petitions for writ of mandate holding:

1. The Legislature's explicit refusal to provide originally a continuous appropriations statute, or other actuarial reserve financing method, for the LRL precluded the establishment of vested contractual rights under that retirement system protected by the federal Constitution. App. 68a. "In order for the state to incur contractual obligations under the LRL, it must have appropriated funds for payment of the benefits as they became due". App. 95-96a. The Legislature retained control over the payment of benefits by refusing to provide for a continuing appropriation, therefore, it had the power to preclude LRL allowances from including "unexpected and unfair windfall adjustments."

2. Court would allow a substantial impairment of the employment contract on the theory that since the Legislature had felt free to increase allowances, and recipients had felt free to accept additional benefits, by their conduct the parties had recognized a residual legislative power to modify pension benefits. Relying on two cases, *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774 and *Allen v. Board of Administration* (1983) 34 Cal.3d 114 involving legislators who had served part time, not Constitutional officers, the court found Proposition 57 merely denied petitioners an unforeseen windfall advantage which had no relation to the real theory and objective of a retirement system. Thus, even asssuming petitioners obtained vested contractual rights, those rights were not impaired by the enactment of Proposition 57. App. 140a-150a.

3. Court held that they were not precluded from considering the validity of Proposition 57 pursuant to *Betts v. Board of Administration* (1978) 21 Cal.3d 859 under the doctrines of stare decisis, res judicata and colateral estoppel. The application of "*Betts*" does not compel the conclusion that Proposition 57 is an unconstitutional infringement of contract rights." App. 161-188a.

4. The court further held Proposition 57 does not operate in an arbitary and unequal manner permitting some former constitutional officers to retain extraordinary benefits while restricting others. App. 177a.

5. The Court rejected petitioners assertion that Proposition 57 represented a change to their disadvantage without comparable new advantages in accord with *Allen v. City of Long Beach* (1955) 45

Cal.2d 128, 131 and *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864-865 (App. H, 246h) saying, "If the LRL had been a vested system and had the benefits been reasonable rather than absurdly extravagant, we would be inclined to agree. But since LRL possessed neither characteristic, we disagree." The failure to provide a continuing appropriation for the payment of benefits precluded the acquisition of express or implied contractual rights against the state. App. 156a-157a. The court construed Proposition 57 as an appropriation for payment of the benefits granting a comparable new advantage to offset the limitation upon petitioners' allowances.

It also held that Proposition 57 was intended to apply to members who had also served as legislators. App. 188a-221a. This issue is not before this Court.

On September 4, 1990, the California Court of Appeal discharged the alternative writs and the petitions for a peremptory writ of mandate were denied certifying its opinion for publication. App. 1a. On October 1, 1990, the Court of Appeal entered an order denying a rehearing. App. 225b. On December 20, 1990, the Supreme Court of California denied review while decertifying the publication of the opinion. App. 226a.

REASONS FOR GRANTING THE PETITION

The holding of the Court of Appeal that public employees' retirement rights under the LRs are NOT contractual; they are not NOT "vested"; and the earned pension rights of retired public officer and employees are not under the protection of the Federal Constitutional Contract Clause is contrary to the long standing precedents of this Court as well

as the California Supreme Court.

The applicable rule here is supplied by the case of *W. B. Worthen Co. v. Kavanaugh* 295 U.S., at 63. If the Contract Clause means anything at all, it means that California can not constitutionally do what it tried to do to the retirees in this case.

In cases involving state legislation affecting private contracts, the Supreme Court's decisions over the past half century consistently with both the constitutional text and its original understanding, have interpreted the Contract Clause as prohibiting state legislative Acts which, "[w]ith studied indifference to the interests of the [contracting party] or to his appropriate protection," effectively diminished or nullified the obligation due him under the terms of a contract. (*W. B. Worthen Co. v. Kavanaugh*

(1935) 295 U.S. 56, 60.)

The spurious issue raised by the Court of Appeal that the Legislature never intended that the Legislators' Retirement System's rights were contractual rights because 9358.1 provided that 9358 was not an appropriation; that there had to be a specific funding mechanism at the establishment of a retirement system before pension rights were vested; and repeated inferences that a system had to be actuarially funded for rights to be vested jeoparizes public employee' retirement rights in many states including California. There is no authority for such a radical view of constitutionally protected contractual rights. Historically, pension systems were established on a pay-as-you-go basis and were rarely placed on a reserve funding basis. Since Congress commenced its studies preparato-

ry to the passage of the Employee Retirement Income Security Act of 1974 (ERISA), the trend has been toward improved funding practices in public systems as well as that now required in private systems.

In language directly applicable here, the California Supreme Court noted that "'[p]ension annuities . . . are in effect pay withheld to induce long-continued and faithful services.'" (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852, quoting *Giannettino v. McGoldrick* (46) 295 N.Y. 208, 66 N.E. 57, 59.) "It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits, and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary." (*Kern, supra*, 29 Cal.2d at 856.)

If the Court of Appeal's decision is not reversed, retirement benefits held out by a governmental body have been, and will be, but a snare for the unwary. As vital as it is that our country have the brightest men and women in governmental positions, candidates who are in the midst of productive professional careers will not surrender their professional futures to enter a position with limited job security and uncertain retirement benefits. The public may suffer by losing competent, qualified persons in public service, whether as Constitutional officers, judges, teachers, or government employees generally.

Congress in enacting ERISA made detailed findings which recited in part, "'that the continued well-being and security of millions of employees and their dependents are directly affected by

these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . .'ERISA Sec. 2(a), 29 U.S.C. Sec. 1001(a). . . .'" (*Nachman Corp. v. Pension Benefit Guar. Corp.* (1980) 446 U.S. 359, 361-362.)

Congress wanted to correct this condition by making sure that if a worker had been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it. (*Id.* at pp. 374-375.)

During Congress' years of investigation preparatory to enacting ERISA, consideration was given to including public employees under its protection. Ultimately, that concept was rejected.

Unlike a private employer, who may be quickly affected by adverse changes caused by any number of factors, and have to close his doors, a state, city, county, or district is not affected by such factors. It is assumed that a unit of government will last forever and probably grow forever, always in a position to levy more taxes to cover unfunded benefit costs, if any.

The Court of Appeal's invention of the requirement that a retirement system without a continuing appropriation provision precluded the establishment of vested contractual rights; and that the unfunded actuarial liability of a retirement system violated the debt limitation of the California Constitution is manifestly erroneous and palpably wrong. A similar provision is contained in many other state Constitutions.

Although the people in the heat of a political campaign, and later the Court of Appeal, sought to impair earned pension benefits in a defined benefit system on the theory that the benefits were "extravagant" and "windfalls" sets a very dangerous precedent. There was little specific evidence as to the exact amount the parties were receiving after modification of their allowances and their economic circumstances. Forgotten is the legal precedent that earned pension benefits are deferred compensation.

> "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."
>
> (Alexander Hamilton in III (John C.) Hamilton, History of the Republic of the United States (1859), p. 34, quoted in *United States v. Brown* (1965) 381 U.S. 437 at 444.)

Public retirees are entitled to the

protection of their earned pension benefits just as retirees in the private sector. Congress has guaranteed protection for the latter, now the Court needs to protect the former. Petitioners were promised a defined pension benefit upon retirement, each fulfilled all conditions required. They seek only the deferred compensation of their employment contract; not a windfall, their just due.

Because the radical and innovative concepts of the Court of Appeal have been published, the entire field of retirement benefits may be destablilized. The Opinion also relies upon outdated and irrelevant authority, and fails to consider, or erroneously considers, the leading cases on the subject of earned pension rights of public employees, both of the United States and California Supreme Courts. It should not be permit-

ted to stand and cloud this complex area of law, jeopardizing retirees' contract rights generally and making a mockery of the purpose for which retirement systems are established, namely, to encourage able men and women to serve the public, and once in office, to continue to serve. After service has been rendered and the contract fully earned by the employee, this decision would allow the State, or any public employer, to destroy him economically by substantially reducing earned and vested pension rights in abrogation of the provisions of the contract of employment during the employee's rendition of service without any offsetting comparable, commensurate advantages. All public retirement systems may be placed in jeopardy if a governmental entity wishes to reduce promised benefits to retirees for any

reason. In order that public employees and retirees may continue to anticipate and enjoy the retirement benefits which they have been specifically promised, the writ should be granted.

I. THE COURT OF APPEAL'S HOLDING THAT RETIREES' EARNED PENSION BENEFITS WERE NOT RIGHTS PROTECTED BY THE CONTRACT WAS CONTRARY TO LONG STANDING PRECEDENT OF THIS COURT

The Court of Appeal'S decision failed to apply the Law of Contracts or honor reasonable expectations. The first rule of Contract Law is that the reasonable expectations of the parties must be preserved. The first rule of Constitutional adjudication is judicial restraint. The Court of Appeal managed to break both these rules at once. Having held that earned pension benefits are not contractual rights, the court failed to

apply ordinary rules of contract law, under which it is clear that Proposition 57 is an impairment of the Contract Clause. As a result the Court of Appeal was plunged into a speculation without any basis of fact in the record before them and ended by striking down not only Proposition 57 but the precedent setting case of *Betts v. Board of Administration* (1978) 21 Cal.3d 859.

If the Contract Clause is to retain any meaning, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships. The existence and nature of those limits in a series of Supreme Court cases was discussed in *Allied Structural Steel Co. v. Spannaus* (1977) 438 U.S.234, 242-244.

Despite the customary deference courts give to state laws directed to

social and economic problems, "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. The impairments of a State's own contracts face more stringent examination under the Contract Clause then laws regulating contractual relationships between private parties. (*United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23.)

The Court in *Allied* said, "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obliations may end the inquiry at its first stage.

Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

"The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. **Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.**" (Emphasis added.)

Here, the petitioners contract of employment with the State of California included as an additional form of compensation, a defined benefit pension plan, deferred compensation. While serving

their State at very modest compensation compared to private industry, they relied heavily, and reasonably, on their legitimate contractual expectation to a basic retirement allowance based upon the current salary of the incumbents. When commencing to draw their retirement allowance, they had to make a binding selection of options between an unmodified allowance with no provision for a surviving spouse, or one of two modifications in order for a surviving spouse to receive an allowance. App. 236e. The amount of a retirement allowance varied substantaily depending upon their choice, and once made and the first check received, the choice was irrevocable.

The only indication of legislative intent in the record is found in Proposition 57. The intent was to substantially impair petitioners' retirement allowances

by converting the basic allowance from a fluctuating to a fixed allowance. They ignore the ages of the parties, the inadequate compensation while they served, and find "windfalls" with no evidence of the modified retirement allowances. The Court of Appeal engaged in mere speculation as to the state legislature's purpose.

The facts are as discussed in *Allied Structural Steel, supra,* at p. 234, "[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure,' *United States Trust Co.* U.S. at 23, simply cannot stand in this case."

Proposition 57 can hardly be charac-

terized like the law at issue in the *Home Building & Loan Association v. Blaisdell*, 200 U.S. at 439 case, as one enacted to protect a broad societal interest rather than a narrow class. Further, this legislation imposed sudden, totally unanticipated, and substantial reductions in the vested contractual rights of these retirees.

II. A LEGISLATIVE ENACTMENT SUCH AS THE LRL CONTAINS PROVISIONS WHICH, WHEN ACCEPTED BY INDIVIDUALS, BECOME CONTRACTS BETWEEN THEM AND THE STATE WITHIN THE PROTECTION OF THE CONTRACT CLAUSE

The Court of Appeal erred in relying on the cases of *Dodge v. Board of Education* (1937) 302 U.S. 74 and *Phelps v. Board of Education*, 300 U.S. 319. A similar case which is a precedent here is *Indiana Ex Rel. Anderson v. Brand, Trus-*

tee (1937) 303 U.S. 95. The Indiana Supreme Court had held that the repeal of the Teachers' Tenure Law did not deprive the petitioner of a vested property right and did not impair her contract within the meaning of the Constitution. The Supreme Court granted certiorari. The question was whether there was a vested right in a permanent teacher's contract; whether, under the tenure law, there is a grant which cannot lawfully be impaired by a repeal of the statute.

Just as in this matter, the constitutional validity of the repealing act was drawn in question, and the lower court sustained the statute, so the writ was issued.

The court held the repealing act was an abridgment of contractual rights at p. 100:

> "As in most cases brought to this court under the contract

clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. **Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, Sec. 10.** [8] . . .
(Emphasis added.)

On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court **but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its**

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8. *New Jersey v. Yard*, 95 U.S. 104, 113,114.

obligation.[9] This involves an appraisal of the statutes of the State and the decisions of its courts.

. . But we are of opinion that the petitioner had a valid contract with the respondent, the obligation of which would be impaired by the termination of her employment.

Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual. (quoted case)

We think the decision in this case runs counter to the policy evinced by the Act of 1927, to its explicit mandate and to earlier decision construing its provision. Also that the decision in *Phelps v. Board of Education*, 300 U.S. 319, that the Act there considered did not create a contract, is not, as the court below suggests, authority for a like result here. *Dodge v. Board of Education*, 302 U.S. 74, on which the respondent relies is distinguishable, because, the

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9. *Phelps v. Board of Education*, 300 U.S. 319, 322, and cases cited.

> statute there involved did not purport to bind the respondent by contract to the payment of retirement annuities, and similar legislation in respect of other municipal employees had been consistently construed by the courts as not creating contracts.
>
> "The contracts designed to be protected by the Federal Constitution are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. . . .

The petitioners had perfect rights, certain and definite under the LRL. The petitioners voluntarily accepted the provisions of the LRL and they became a part of their employment contract with vested contractual rights between the State and them.

III. THE CALIFORNIA SUPREME COURT HAS HELD FOR OVER HALF A CENTURY THAT PENSION RIGHTS ARE CONTRACTUALLY "VESTED"; PROTECTED BY THE CONTRACT CLAUSE OF THE CONSTITUTION

One of the most recent pension decisions recapitulates and reaffirms California's pension law in the case of *United Firefighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal.App.3d 1095 and it would appear that it is directly on point. This was an action by two public employee unions challenging a city charter amendment voted by the people which placed a 3 percent cap on pension benefit cost-of-living adjustments. The city also complained of "wind falls". The trial court found the amendment substantially impaired plaintiffs' vested contractual rights under the pension systems. The Court of Appeal affirmed saying in part as follows:

> "*Miller* nicely recapitulates the modern law of public employment pension rights. As the Supreme Court notes, 'upon acceptance of public employment [one] acquire[s] a vested right to a pension *based on the system then in effect*.' (18

Cal.3d at p. 817, italics added; accord, *Carmen v. Alvord* (1982) 31 Cal.3d 318, 325.)[3] 1

'The scope of permissible modifications of vested pension rights was established in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 . . ., and *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438 . . .: 'Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' [Citation.]" . . . *Id* at pp. 1102-1103.

". . .As noted ante, plaintiffs have a vested right not only to benefits substantially similar to those in

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3. A public employee likewise acquired a vested right to additional pension benefits thereafter conferred during his subsequent employment. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859; accord, *Olson v.Cory* (1980) 27 Cal.3d 532.)"

effect when they accepted public employment (*Carman v. Alvord, supra,* 31 Cal.3d at 325; *Miller v. State of California, supra,* 18 Cal.3d at p. 817), but also to additional benefits offered later by the public employer (*Betts v. Board of Administration, supra,* 21 Cal.3d at p. 866). Accordingly, those system members who accepted public employment prior to 1971 have **NOT received a 'windfall profit' from the uncapping of the cost of living adjustment in 1971, BUT ONLY THEIR DUE.** (Emphasis added.)

While it is true reasonable contractual expectations generally are to be measured as of the date the contractual relationship began (*Allen v. Board of Administration, supra,* 34 Cal.3d at pp. 124-125), the contractual relationship at issue here was modified by uncapping of the cost of living adjustment in 1971. Thus, in accord with Betts, supra, the reasonable expectations of plaintiffs in the instant matter must be measured as of that date. (*Id,* pp.1107-1108.)

". . .However, once the cost of living adjustment was uncapped in 1971, plaintiffs did have a reasonable expectation that pension benefits earned thereafter would be fully adjusted for inflation and their post-

> retirement standards of living thus would be protected from any **further** diminution. Without question, charter amendment H defeats this expection.[4] Moreover, the modification embodied in charter amendment is **not** consistent with existing state law and thus cannot be viewed as working no substantial impairment of plaintiffs' reasonable expectations. [Citations.]." Id, pp. 1107-1108.

In the *United Firefighters* case, appellant City of Los Angeles' petition for review was denied by the California Supreme Court on or about July 14, 1989. Their Petition for a Writ of Certiorari to the United States Supreme Court (No. 89-816) was denied January, 1990.

Section 9359.1(b) specifically provided during the tenure of all petitioners that their retirement allowance would be based upon the current salary of the incumbent. They could and did reasonably expect the State to honor its specific commitment for their deferred

compensation. *United Firefighters* relied in part on the *Betts* decision in upholding the employees vested right to their COLA which the City sought to reduce because of serious underfunding and financial problems. The Court of Appeal's opinion in effect overrules the *Betts* case and therefore seriously erodes public employee pension benefits.

IV. CONTRARY TO THE COURT'S DECISION, A FUNDING MECHANISM OF CONTINUING APPROPRIATIONS OR AN ACTUARIALLY FUNDED SYSTEM IS NOT A CONDITION PRECEDENT TO THE VESTING OF AN EMPLOYEE'S RETIREMENT BENEFITS

Public pension systems may be funded by actuarial reserve plans, pay-as-you-go plans or a combination of the two. The Legislature has permitted great flexibilty to the public entities, including the State, in how to fund their benefits.

The payment of Statutory defined benefits, upon maturity, is a general obligation of the public employer regardless of the sums existing in the retirement fund (See *England v. City of Long Beach* (1945) 27 Cal.2d 343, 348; *Bellus v. City of Eureka*(1968) 69 Cal.2d 336, 348-352; *Crowley v. Board of Supervisors* (1948) 88 Cal.App.2d 988, 992; *Carmen v. Alvord* (1982) 31 Cal.3d 318.)

As held in *Bellus*, a governmental body possessed of plenary power to adopt a pension system, cannot escape liability for those pension payments which it has led its employees reasonably to expect. In this respect it is no different from any other employer or public service institution which induces reliance on a contract that may reasonably be interpreted to afford a protection already impliedly promised.

These public officials reasonably expected to be paid the defined benefits which the LRL had held out to them after they rendered their service. The State cannot escape the continuing liability for the payments of benefits unimpaired by the application of Proposition 57. At this late date, the court cannot initiate the requirement of a particular funding method for pension benefits of retirees to be vested.

A. THE COURT'S CONCLUSION THAT THE LEGISLATURE'S "EXPLICIT" REFUSAL INITIALLY TO PROVIDE BY STATUTE FOR CONTINUOUS APPROPRIATIONS FOR THE LRL PRECLUDED THE ESTABLISHMENT OF VESTED CONTRACTUAL RIGHTS UNDER THE LRS IS CONTRARY TO LAW AND FACT

When the LRL was enacted, 9358 provided that, "the State **SHALL** contrib-

ute annually to the Legislators' Retirement Fund, an amount equal to so much of the benefits to be paid . . .", a pay-as-you-go method. The Court of Appeal maintains that 9353.1 was an explicit refusal of the Legislature to appropriate funds to support the LRL because it provided: The provisions of 9358 do not constitute an appropriation of money from the State Treasury. 9358.1 further provided the sum required for state contributions **shall be appropriated** in each State Budget Act, **or otherwise.** (P. 9).

During the early years of the growth of pension systems, there was no requirement for actuarially based retirement funds, or a provision for continuous appropriations or continuing obligations of the governmental entity for vested contractual rights to the benefits provided unless specifically required in a

particular system. Here the Legislature provided flexibility for its funding of the system. The history of the LRS evinces a clear intention of the Legislature to adequately fund the system to meet the liabilities as they fell due. There is a Historical Analysis of Income and Expenditures from 1947 -1989 of the Legislators' Retirement Fund which demonstrates the Legislature always intended to, and did, fund the system. At June 30, 1988, it had a funded ratio of 78.1% compared to the Judges' Retirement System's funded ratio of .2%. Following the Court of Appeal's flawed logic, it could be argued the Legislature is explicitly refusing to fund the JRS by failing to fully fund the system as required by law since 1972 by 2002, and thus judges and JRS retirees have no vested right to their statutorily defined benefits.

In addition to the mandatory language of 9353.1 requiring the annual appropriation, or otherwise, to the LRF, there is an express continuing obligation by statute. 9353 provides that the LRS shall be administered by respondent in accordance with the provisions of the Public Employees' Retirement Law (PERL) to the same extent and with the same effect as if those provisions were in the LRL except as to the provisions for benefits. PERL 20757 provides that all payments to be made by the State to the Retirement Fund are "continuing obligations" of the state.

B. THE COURT ERRED IN HOLDING THAT THE "UNFUNDED LIABILITY" OF A RETIREMENT SYSTEM VIOLATES THE DEBT LIMITATION OF THE CALIFORNIA CONSTITUTION

Since most retirement systems have

an unfunded liability, the radical concepts advanced by this decision could jeopardize most employees as well as retirees' pension rights. For example, the Judge's Retirement System is still on a pay-as-you-go method and had an unfunded liability of $1,479,310,000 on June 30, 1987. (See A.C. Brief, p. 11.) While preserving the employees' vested contractual rights, the court in *United Firefighters,* at p. 1112 noted the pension systems' unfunded liability of $3.37 **billion.**

Our courts have never held a retirement system's unfunded liability is a debt subject to the limitations in the California constitution. The position of the Court of Appeal overlooks the basic fact that employees do not receive, nor is anything due, from the pension system until the employee has qualified and

actually retired. No basis for any legally enforceable obligations arise until the events occur. When they do the amount of liability will be based on actual experience rather than projections. (*65 Ops.Cal.Atty.Gen. 571; Rochin v. State* (1975) 540 P.2d 643.)

V. THE COURT ERRED IN ITS OPINION THAT THE STATE MADE NO CONTRIBUTIONS ON PETITIONERS' BEHALF WHEN THEIR BENEFITS ACCRUED; THE COURT APPEARS TO CONFUSE THE LRL DEFINED BENEFIT PLAN WITH A DEFINED CONTRIBUTION PLAN

The Court of Appeal justifies Proposition 57'S purpose by comparing contributions with benefits. When these petitioners elected to join the LRS, they made their contributions in accordance with the percentage set forth in the LRL based upon a full time salary of a Con-

stitutional officer. It was not a percentage of a part time salary of a pre-1967 legislator as in the case of *Lyon v. Flournoy*. At App. 154a the Court said:

> 13/ During the period petitioners claim to have accrued their extraordinary pension rights they made modest contributions to the fund and the state made no contributions on their behalf. Petitioners contributions were obviously long ago dissipated by the extraordinary benefits they received. Petitioners seem to believe that their benefits can be paid from the state's contributions on behalf of current officers. They are wrong. Since 1978 the state has made contributions to the fund on behalf of current officers. The soundness of the system is achieved through this reserve funding and the restriction upon benefit levels which may be earned. The reserve funding paid on behalf of members since 1978 is part of the contractual rights of those members and it cannot be used for other purposes, such as the payment of benefits to petitioners. (*Valdes v. Cory, supra*, 139 Cal.App.3d at pp. 786-787.)

The above footnote is without fact or foundation. Contributions are irrelevant in a defined benefit plan. Some plans require no contribution by the

employee. The specific formula of benefits is the material factor. There is nothing in the record regarding the individual's contributions. Appropriations annually have always exceeded the current liabilities of benefits paid. Petitioners and the other parties in interest can expect to be paid in accordance with the LRL from the LRF which was established when the system was enacted as described in the Statement of Facts herein. App. 237f. The Legislature appropriated money to the LRF to fully fund petitioners' benefits in the 1970ties. Earnings on the investments annually exceed the benefits paid now. **The Court totally ignores the fund in its decision.**

VI. THE COURT OF APPEAL ERRED IN NOT APPLYING THE PRECEDENT IN *BETTS*; THE RELIANCE ON *LYON* AND *DON ALLEN* WAS MISPLACED

The Opinion of the Court of Appeal discusses *Betts v. Board of Administration* (1978) 21 Cal.3d 859 at length. App. 161a-188a. The alleged facts, speculations, and conclusions are patently erroneous. A copy of the *Betts* case is reprinted at App. 246h-266h. Betts is one of the parties affected by Proposition 57. The case is one of California's landmark decisions and frequently cited in California and other states.

The present Court discusses and relies on two cases involving former legislators who had served when the post was part time, App. 178a. The circumstances in the case of legislators presented a different fact situation in which they could not have reasonably expected the benefits sought based on the reasonable purport of their employment contract; such benefits were found to be

windfalls. However, the Supreme Court in *Betts* held that his rights were no windfall. The court said specifically that his basic retirement allowance would be adjusted periodically to reflect the increase in salary of the incumbent. The Supreme Court also distinguished the facts in Betts from the *Don Allen* case, and affirmed its decision as to Betts in *Olson I* (1980) 27 Ca.3d 532, 543:

> "*Betts* is distinguishable on the ground that, unlike the instant case, there was express legislative direction mandating the cost-of-living adjustment to be applied to the fluctuating basic retirement allowance. (Id, at p. 865.) It was thus necessarily held that since statutes establishing **both** the fluctuating basic retirement allowance and the cost-of-living adjustment thereto were in effect during the pensioner's term in office, he had acquired vested rights to the dual benefits. . ."

The Court of Appeal has talked extravagantly about "windfalls", but there is little in the record to assist

them. The flight into fantasy that pensions would reach a level of $200,000 ignores the ages of these former officers, the required modifications to provide for a spouse, and the limit of 8 years of credited service unless the officer had served 24 years.

There are declarations in the record that in 1990, Virginia Knight's pension was $26,858. If it were based upon the 1987 salary of the governor, it would be about $46,494. Wilson Riles' pension after 12 years of service was $17,710 based on $42,500 or $22,764 if calculated on the 1987 salary. These are no windfalls or bonanzas.

VII. THE COURT'S DECISION APPLYING A CONSTITUTIONAL AMENDMENT TO PROMISED DEFERRED COMPENSATION NOT ONLY IMPERMISSIBLY IMPAIRS CONTRACTUAL RIGHTS, IT ALSO VIOLATES THE DUE

PROCESS CLAUSE OF THE U. S. CONSTITUTION, 14TH AMENDMENT; AND IN THIS CASE THERE IS ALSO A DENIAL OF EQUAL PROTECTION UNDER THE 14TH AMENDMENT

The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

At App. 178a, the Court states that Proposition 57 does not permit some former constitutional officers to retain extraordinary benefits while restricting others. That is wrong. There is an arbitary classification between the Statewide officers and the former Board of Equalization members, as well as between judges and legislators.

The Legislature placed Proposition 57 on the ballot in 1986 to prevent the augmentation of the basic retirement allowance of the Constitutional officers

by the 1983 legislation which increased their salaries effective January 5, 1987. The salaries in the 1983 legislation ranged from a low of $68,000 for members of the Board of Equalization to $85,000 for the governor. Cost of living increases for the statewide officers would run from January 5, 1987 while cost of living increases for the Board of Equalization members ran from July 1, 1984. Therefore, when Proposition 57 was enacted November 5, 1986, the Governor was still receiving $49,100, the Attorney General, $47,500, and the other Statewide officers were receiving $42,500. On the other hand, July 1, 1986, the members of the Board of Equalization had received several annual cost of living increments, and their salary was $82,007. These salaries are now the basis for PERS' calculation of benefits.

For example, after Proposition 57, PERS commenced to calculate the basic retirement allowance for the widow of fugitive William Bonelli based on $82,007 while the allowance for the widow of Governor Knight and Governor Pat Brown is based on 40% of $49,100; a former attorney general upon $47,500, and the other former Constitutional officers upon $42,500. (This compares with a retired judge's allowance of up to 75% of the current incumbent judge's salary [in 1990, $94,344 for a Superior Court judge to $120,764 for the Chief Justice] or an automatic 50% thereof to his widow.) Since the responsiblities for the statewide Constitutional officers is greater than that of the members of the Board of Equalization, and the Board's salary was originally set in 1983 at a figure lower than all the statewide officers, it is

obvious that we have an arbitrary, capricous and unconstitutional classification.

There is no showing that the state's objective is important enough to justify impairment of the individual's fundamental interest, and the classification should fall. The attempt by Proposition 57 to arbitrarily deprive petitioners of a basic allowance calculated upon the current incumbent's salary is a violation of due process and equal protection under the law. The handful of retired Constitutional officers or their beneficiaries adversely affected by this Proposition is an arbitrary classification and its purpose runs counter to the primary goals and objectives of government retirement systems which would be jeopardized by a decision allowing the impairment of vested contractual rights of retirees with no offsetting benefits.

CONCLUSION

For the reasons stated, this court should grant the petition for a writ of certiorari to the Court of Appeal of the State of California in and for the Third Appellate District.

Respectfully submitted,

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April 19, 1991

APPENDIX A

APPENDIX A

OPINION

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA THIRD APPELLATE DISTRICT

FILED
SEP 4 - 1990
COURT OF APPEAL 3RD DISTRICT
ROBERT L. LISTON, CLERK
BY _____, DEPUTY

(Sacramento)

VIRGINIA KNIGHT, et al., Petitioners,	)	
v.	)	C005934
BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent.	)	
HOUSTON I. FLOURNOY et al., Petitioners,	)	
	)	C005622
BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent.	)	

ORIGINAL PROCEEDING; applications for peremptory writs of mandate. Writs denied.

Barbara Lang Betts for Petitioners in C005934.

Stroock & Stroock & Lavan, William H. Levit, Margaret A. Nagle, Marcy P. Howard and Eric G. Lardiere for Petitioners in No. C005622.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Supervising Deputy Attorney General, Ramon M. de la Guardia, Deputy Attorney General, for Respondent.

Robert F. Carlson and Charles P. Valdes as Amicus Curiae.

In these original proceedings we are called upon to determine the validity and application of article III, section 7, of the California Constitution.[1] That measure, dealing with the retirement benefits of elected state constitutional officers, was added to the Constitution

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1. Following oral argument, we ordered the two proceedings consolidated on our own motion for the purpose of rendering a single opinion.

when the People passed Proposition 57, a legislative constitutional amendment, at the November 4, 1986, General Election. Prior to the passage of Proposition 57, certain former elected state constitutional officers, or their survivors or beneficiaries, had received retirement allowances which, in effect, included double cost of living increases. These allowances were based upon the current salary for the office the retiree last held, thus reflecting any cost of living or other salary increase subsequently granted for that office, and were further increased for cost of living increases based upon the Consumer Price Index. By Proposition 57 the People decreed that future allowances would be based upon the salaries being paid elected state constitutional officers on November 4, 1986, but would not be adjusted to reflect

salary increases which took effect on November 5, 1986, or thereafter. The cost of living adjustments based upon the Consumer Price Index, however, were not affected.

Petitioners are recipients of retirement allowances under the Legislators' Retirement Law (LRL) as former state constitutional officers or their survivors or beneficiaries.[2] (Gov. Code. Sec. 9350, et seq. [unless otherwise specified further section references are to the Government Code].) Following the passage of Proposition 57, the respondent Board of Administration of the Public Employees' Retirement System (PERS),

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2. For purposes of the LRL, the term "legislator" means "a Member of the Assembly or a Member of the Senate, an elective officer of the state whose office is provided by the Constitution, or a legislative statutory officer." (Gov. Code Sec. 9351.3.) The issues presented in this case involve only former constitutional officers first elected before 1972.

advised petitioners that their future benefits would be calculated without regard to future salary increases of elected constitutional officers but would continue to reflect increases in the Consumer Price Index. Petitioners seek a peremptory writ of mandate ordering PERS to calculate their retirement allowances without regard to Proposition 57. They assert that Proposition 57 is an unconstitutional infringement of their vested contractual rights in violation of the contract clause of the federal Constitution.[3] (U.S. Const., art. I, Sec. 10, cl. 1.) In addition, petitioners Houston I. Flournoy and Harold J. Powers contend that Proposition 57 does not

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3. Contractual pension rights are said to be "'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 779.)

apply to them because they served both as members of the Legislature and as elected constitutional officers. After considering Proposition 57 from several perspectives, we are inexorably led to the conclusion that Proposition 57 is valid and does not impair any contractual rights of petitioners in violation of the contract clause. We further conclude that Proposition 57 applies to petitioners Flournoy and Powers. Accordingly, we shall deny the mandate petitions.

FACTUAL AND LEGAL BACKGROUND

The Legislature enacted the LRL for its benefit in 1947 (see Stats. 1947, ch. 879, Sec. 1, pp. 2058-2065), and has frequently and extensively amended it. In fact, during the first 30 years of the LRL the Legislature rarely met without amending it in some respect. It would be both unwise and unnecessary to attempt to

recount a complete history of the LRL. Instead we will merely highlight its most significant aspects.

At the time of its enactment participation in the LRL was limited to members of the Legislature. In order to participate, legislators were required to file an election to do so within 90 days of the effective date of the LRL or within 90 days of commencing their first term of office. (Former Sec. 9355, Stats. 1947, ch. 879, Sec. 1, p. 2060.) At that time it was specified that members of the Legislature who elected to participate would contribute four percent of their salary into a fund. (Former Sec. 9357, Stats. 1947, ch. 879, Sec. 1, p. 2061.) Such contributions were obviously insufficient to fund fully the retirement benefits for members so the Legislature provided that the state would contribute,

on an annual basis, the amounts by which benefits payable would exceed accumulated contributions of retired members. (Former sec. 9358; Stats. 1947, ch. 879, sec. 1, p. 2062.) At that time section 9358.1 imposed a significant and highly unusual restriction upon the LRL. It provided, in relevant part: "The provisions of Section 9358 do not constitute an appropriation of money from the State Treasury. The sum required for state contributions shall be appropriated in each State Budget Act, or otherwise." (Stats. 1947, ch. 879, sec. 1, p. 2062.)

The actual implementation of the LRL was delayed because the Attorney General had earlier rendered an opinion that the enactment of the LRL would be unconstitutional in the absence of a constitutional amendment and as a result PERS refused to file the elections of the legislators to

become members. (See 9 Ops.Cal. Atty.Gen. 115 (1947); Stats. 1948, ch. 10, sec. 2 p. 13.) Eventually the Supreme Court upheld the LRL. (*Knight v. Bd. etc. Employees' Retirement* (1948) 32 Cal.2d 400.) [4] The Legislature then extended the

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4. At the time the LRL was enacted the state Constitution set the salaries for members of the Legislature at $100 per month and provided that members "shall receive no compensation for their services other than that fixed by the Constitution." (Cal. Const., former art IV, sec. 23, 23b.) The Attorney General had concluded that legislators were not state employees within the meaning of the constitutional provision authorizing the payment of retirement salaries. (9 Ops.Cal. Atty.Gen. 115 (1947).) Consequently, since the fixed compensation for legislators did not include retirement salaries, any such allowances would exceed the compensation fixed by the Constitution and were thus forbidden to members of the Legislature by the Constitution. The Attorney General opined that "the proper approach to the problem of securing retirement salaries for members of the Legislature must be by way of a constitutional amendment." (*Id.* at p. 119.) The Supreme Court disagreed. The Constitution, the Court noted, gave the Legislature the power to provide for the payment of retirement salaries to "employees of the state." (Cal. Const., former art. IV, sec. 22a.) The Court then broadly construed the term "employees of the state" to include members of the Legislature and concluded that article IV, section 22a modified article IV,

period in which an election could be filed. (Former sec. 9357.2, 9355.05, Stats. 1949, ch. 3, sec. 1-2, pp. 5-6, and see Sec. 3, p. 6.) It is now provided that an eligible person may elect to participate in the LRL by filing an election to do so at any time during his or her incumbency. (Sec. 9355.)

In 1949 the LRL was amended to permit elected constitutional officers, except judges, to participate in its benefits. (Sec. 9355.4, Stats. 1949, ch. 1570, sec. 4, p. 2808.) Elected constitutional officers include the Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction,

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sections 23 and 23b "to the extent of permitting a retirement system for legislators." (*Knight v. Bd. etc. Employees' Retirement, supra*, 32 Cal.2d at pp. 402-403.)

and the four elected members of the Board of Equalization. Any such officer was permitted to file an election to participate within 90 days of the effective date of the amendment, or within 90 days of taking office. (sec. 9355.5, Stats. 1949, ch. 1570, sec. 4, p. 2808.) [5]

In 1949 the LRL retirement allowance which would become payable to a retired member were set forth in a single para-

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5. PERS sought an opinion from the Attorney General whether the LRL could be extended to incumbents in view of article V, section 22 of the state Constitution which provided: ". . . the compensation of no State officer named herein shall be increased nor diminished during his term of office." The Attorney General opined that the LRL could be granted to incumbents since they had been permitted to participate in PERS and the amendment to the LRL merely permitted such officers to switch to the LRL from PERS. It was reasoned that constitutional officers did not have a right to any fixed or definite benefits but only to a substantial and reasonable pension and a change in the manner of calculating benefits, such as a switch from PERS to the LRL, would not offend the constitution so long as the benefits to be paid remained substantial but not unreasonable. (14 Ops.Cal.Atty.Gen. 258, 259-260 (1949).)

graph. (Former sec. 9359.1, Stats. 1949, ch. 1570, sec. 7, p. 2809.) A retired member was scheduled to receive five percent of the compensation payable, at the time the allowance became due, to the officer holding the office which the retired officer last held, multiplied by the years of service of the retired officer, not to exceed fifteen years in the case of a member of the Legislature, and not to exceed seven years in the case of any other officer. Retirement allowances for retired legislators were not permitted to exceed 75 percent of the compensation of current legislators, and retirement allowances of other officers could not exceed 35 percent of the compensation of the current office holder.

In 1951 the Legislature subdivided section 9359.1 and added a new provision to deal with "mixed" members, that is

members who served both in the Legislature and as elected constitutional officers. (Former sec. 9359.1, Stats. 1951, ch. 1660, sec. 5. p. 3794.) In subdivision (a) the Legislature provided for a member "all of whose credited service was rendered as a Member of the Senate or Assembly." The benefits for such persons remained as they had been, namely, five percent of the current compensation of the Legislature, multiplied by the years of service, not to exceed fifteen years, and to a maximum of seventy-five percent of the current legislative salary. In subdivision (b) the Legislature provided for a member "all of whose service was rendered as an elective officer," other than as a judge or legislator. The potential benefits for such a person were increased to five percent of the compensation of the incumbent in the office

last held, multiplied by the years of service, up to eight years and not to exceed forty percent of current incumbent's compensation.

In subdivision (c) the Legislature provided for benefit levels for persons "part of whose credited service was rendered as a Member of the Senate or Assembly and part of whose service was rendered as an elective officer." Such persons could receive benefits of five percent per year, up to eight years, of the compensation payable to the officer holding the highest salaried office which the member held at any time during his service. It was further provided that if the member would receive a higher allowance if all of his service had been in the Legislature or as an officer, "then all of his credited service shall be deemed to have been rendered as a Member

of the Senate or Assembly or as such other elective officer," and he would receive an allowance under subdivision (a) or (b), whichever was greater.

At this point in time the benefit formula under subdivision (c) for members with mixed service was closely parallel to the formula for retirement officers under subdivision (b). Both provided benefits of five percent of the incumbent's salary for each year of service, up to a maximum of eight years. The primary differences were: under subdivision (c) a mixed member was permitted to tack service as a legislator to service as an officer up to the eight year maximum; and (2) under subdivision (c) benefits were measured against the incumbent in the highest salaried office the member held prior to retirement rather than against the incumbent in the last office

held by the officer, as in subdivision (b). In the event a higher allowance would be due under (a) or (b) if service had been in the Legislature or as an officer, then the member would be entitled to the higher allowance. Subdivision (c) thus avoided the confusion which would result from attempting to calculate part of an allowance on the basis of the legislative formula and part on the basis of the officer formula. It also had the obvious utility of avoiding forfeiture of a once-obtained allowance level in the event a former officer became a member of the Legislature or vice sersa.

In 1957 the Legislature apparently became concerned with protecting former officers against potential decreases in salary levels and again amended section 9359.1. (Stats. 1957, ch. 1213, sec. 1, pp. 2496-2497.) In doing so the Legisla-

ture left subdivisions (a) and (c) intact. In amended subdivision (b) by adding a provision that a retired officer's allowance shall not be less than five percent per year up to eight years, of the compensation payable to the retired officer at the time of his retirement. In 1959 the Legislature again amended subdivision (b) while leaving subdivisions (a) and (c) intact. (Stats. 1959, ch. 766, sec. 1, pp. 2752-2753.) On this occasion the Legislature provided that a retired officer's allowance was to be measured against the salary of the incumbent or the highest salary for the office last held by the officer during the officer's last term or any subsequent term. The provision limiting the allowance to 40 percent of the incumbent's salary was deleted.

In 1961 the Legislature acted to

increase potential legislative retirement benefits by amending subdivision (a) of section 9359.1. (Stats. 1961, ch. 1897, sec. 2, pp. 4006-4007.) It was provided that retired members of the Legislature would be entitled to five percent per year of service, of incumbent legislative salaries, up to fifteen years, and to an additional allowance of two percent per year or fraction of a year of service in excess of fifteen years. The limitation to 75 percent of current salary levels was deleted in favor of a limitation to "the compensation payable" to current members of the Legislature, which was then rendered inoperable by making the two percent per year additional allowance an exception thereto. Shorn of its elliptical language, at this point subdivision (a) provided for legislative retirement benefits of the current legis-

lative salary multipled by five percent per year of service up to fifteen years, plus two percent per year of service in excess of fifteen years, with no limitation.

The 1963 legislative session was a significant one for the LRL as numerous bills were enacted to amend it. Section 9359.1 was amended twice. In the first measure, subdivisions (b) and (c) were not affected. (Stats. 1963., ch. 2103, sec. 2, pp. 4376-4377.) Subdivision (a) was amended to provide that after 15 years of service additional benefits would accrue at the rate of 3 percent per year. In the second 1963 amendment, subdivision (d) was added to provide for the situation in which the surviving widow of a sitting member of the Legislature becomes the immediate successor of that member. (Stats. 1963, ch. 2174,

sec. 1, pp. 4561-4562.) Subdivisions (a) and (b) were not affected, and subdivision (c) was amended to provide that in the event a mixed member could receive greater benefits under subdivision (d) then that should be the measure of his or her benefits.

In that same year the Legislature was becoming increasingly frustrated by the refusal of the voters to liberalize legislative salaries. At that time, and since 1954, legislative salaries were set at $500 per month by the state Constitution. The Legislature had proposed but the voters had rejected constitutional amendments to either increase legislative salaries or to permit the Legislature to do so by statute. (See *Lyon v. Flournoy, supra*, 271 Cal.App.2 at p. 785.) The Legislature therefor determined to adjust retirement allowances by providing for

cost of living increases. (Ibid.) As a result section 9360.8 was enacted and then renumbered to 9360.9. (Stats. 1963, ch. 2103, sec. 1, pp. 4375-4376; Stats. 1963, ch. 2174, sec. 2, p. 4563.)

Section 9360.9 was made applicable to all LRL allowances paid or payable on or after January 1, 1964. It provided that such allowances should be adjusted to reflect increases in the cost of living between the 1963 calendar year and the 1955 calendar year, inclusive, with a base year of the 1954 calendar year. Thereafter such allowances would be adjusted annually to reflect further cost of living increases based upon the 1954 base year. The measure for these adjustments was to be the average of the separate indices of the cost of living for Los Angeles and San Francisco, as published by the United States Bureau of

Labor Statistics. (Stats. 1963, ch. 2174, sec. 2, p. 4564.) [6]

In 1969 the Legislature amended section 9359.1, subdivisions (b) and (c) to provide additional allowances for officers with lengthy service. (Stats.

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6. In 1966 the voters passed a constitutional amendment which permitted the Legislature to set its own salary. (See Stats. 1966, First Ex. Sess., ch. 139, pp. 960, 967.) The amendment had the effect of approving a salary increase to $16,000 per year pursuant to statute previously enacted by the Legislature. (Stats. 1966, First Ex. Sess. ch. 163, sec. 2, p. 721, adding former sec. 8901. See *Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 778.) Thereafter salary increases were limited to five percent per year. (Stats. 1966, First Ex. Sess., ch. 139, p. 967.) The measure also provided that retirement allowances for members who served prior to the raise were not to be adjusted to reflect the raise and would instead continue to be based upon a $500 per month salary level. (Ibid.) The Legislature acted to implement this provision. (Stats. 1966, First Ex. Sess., ch. 163, sec. 3-5, pp. 728-729.) The legislative salary increase enacted in 1966 took effect at the commencement of the term beginning in 1967. The courts have upheld the denial of fluctuating retirement benefits to members of the Legislature who left office before the 1967 term. (*Allen v. Board of Administration* (1983) 34 Cal.3d 114; *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774.)

1969, ch. 776, sec. 1, pp. 1553-1555.) In subdivision (b) it was provided that if a member is credited with 24 or more years of service then he or she is entitled to an additional one and two-thirds percent of the incumbent's salary or the highest salary paid for the office since the officer served, times the years of service in excess of eight but not to exceed an additional twelve years. This language, like other instances of legislative tinkering with the LRL, was unnecessarily elliptical. In short, it provided an all-or-nothing proposition. If a retired officer had credited service of 24 years or more then he automatically qualified for all of the potential additional allowance (20 percent times the salary base); if he did not have 24 years or more then he did not qualify for any of the additional allowance. Stripped of

its unnecessary language, at this point subdivision (b) provided that the retirement allowance of a retired officer was five percent of the salary base per year of service up to eight years, and sixty percent of the salary base for officers with twenty-four or more years of service.

In the 1969 legislation subdivision (c) was amended so that its provisions remained somewhat parallel to those of subdivision (b). It also provided for an additional one and two-thirds percent per year of service in excess of eight years, up to an additional twelve years of service, for members with twenty-four or more years of service. However, under subdivision (c) the additional 12 years of service credit were required to be attributable to service as an officer. Thus, while service in the Legislature

could be used in calculating the basic eight year allowance and for purposes of achieving the twenty-four years needed for an extra allowance, the extra allowance could only be granted for service as an officer. As before, subdivision (c) provided for treating all service as a legislative member or as an officer under subdivisions (a), (b) or (d), if to do so would result in higher benefits.

In 1971 the Legislature enacted section 9359.13. (Stats. 1971, ch. 1278, sec. 4, p. 2505.) That section provides that for elected constitutional officers who are first elected after the effective date of the section (January 1, 1972), retirement allowances shall not be based upon compensation in excess of the highest compensation received by the member as an incumbent in such office. Cost of living adjustments to such allowances are

to be made under section 9360.10 rather than 9360.9. Section 9360.10, which was enacted in 1966 (Stats. 1966, ch. 164, sec. 5, p. 729), provides that cost of living adjustments are to be based upon the member's date of retirement rather than upon changes in the cost of living since 1954, as provided in sec. 9360.9.

In 1972 the Legislature enacted sec. 9359.5 to provide: "The Legislature finds and declares that on and after January 1, 2002, the Legislators' Retirement System shall be fully funded and actuarially sound." (Stats. 1972, ch. 539, sec. 1, p. 929.) Although that section was repealed in 1977 (Stats. 1977, ch. 937, sec. 1, p. 2864), since that time the Legislature has endeavored to make the LRL bear some resemblance to a funded, actuarially sound retirement system. As a start the Legislature enacted 9354.5

which required PERS to maintain data for an actuarial valuation of the system and commencing June 30, 1973, and thereafter every four years, to conduct an actuarial investigation of the system. PERS was required to make recommendations for financing the system. (Stat. 1972, ch. 1192, sec. 1, p. 2313.)

In 1974 the Governor called the Legislature into a second extraordinary session to consider and act upon legislation relative to the LRL. Among other things the Legislature responded by amending sec. 9359.1, subdivision (b) to provide that a retired officer's benefits are to based upon the highest salary received by the officer while serving. (Stats. 1974, Second Ex. Sess., ch. 1, sec. 5, pp. 3953-3955.) The amendments to sec. 9359.1 were expressly made inapplicable to officers who were retired on

their effective date. (Ibid.) Section 9360.9 was amended to provide that the computation of cost of living increases based upon the 1954 calendar year would apply only to members of the Legislature who did not serve during or after the 1967 Legislative term, and to elected constitutional officers who were first elected prior to 1966. (Stats. 1974, Second Ex. Sess., ch. 1, sec. 7, p. 3956.) The measure was given immediate effect as an urgency statute so that it would be applicable to persons leaving office in 1974. (Stats. 1974, Second Ex. Sess., ch. 1, sec. 10, p. 3957.)

In 1977, for the first time, the Legislature enacted a continuing appropriation for the payment of state contributions on behalf of employees under the LRL. Sec. 9358 was amended to read: "The state shall make contributions on

account of liability for benefits under this chapter in a sum equal to 18.81 percent of the compensation paid members of this system. [ ] From the General Fund in the State Treasury there is appropriated monthly to the Legislators' Retirement Fund the state's contribution pursuant to this section." (Stats. 1977, ch. 937, sec. 2, p.2864.) The Legislature repealed section 9358.1 which since 1947 had specifically provided that section 9358 did not constitute an appropriation. (Stats. 1977, ch. 937, sec. 3, p.2864.)

As a result of this history a small number of former constitutional officers, or their survivors or beneficiaries, were in a position to claim two separate cost of living adjustments to their retirement allowances. First, pursuant to former

section 9360.9 or section 9360.10,[7] they could claim a cost of living adjustment based upon changes in the Consumer Price Index. Second, their retirement allowance would be based upon the current salary of the incumbent, thus reflecting any cost of living or other adjustments which had been made to that salary.

The effect of these double-helix cost of living adjustments can be illustrated by reference to the situation which prevailed immediately before the November 4, 1986, General Election. In setting forth these illustrative figures we note that through the years the Legis-

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7. The adjustment under section 9360.9 is the more beneficent adjustment since it is based upon changes in the Consumer Price Index since 1954 rather than from the time of retirement. Petitioners have identitied 18 persons who are affected by Proposition 57. Of tose persons 13 ieceive adjustments under section 9360.9 and 5 receive adjustments under section 9360.10

lature has created various settlement options which, at the option of the officer, can result in greater survivor or death benefits but with a lower actual stipend during the officer's life. The allowances payable pursuant to these optional settlement plans are proportionate to the basic retirement allowance which is calculated under sections 9359.1, 9360.9 and 9360.10. For illustrative purposes we will set forth only the basic retirement allowance payable to various retired officers under sections 9359.1 and 9360.9, but it should be understood that the actual stipend a retired officer or his survivors or beneficiaries receive may differ in accordance with the settlement option selected and adjustment under section 9360.10, if applicable.

In addition, for purposes of these

illustrative examples, we will base our calculations upon a credited service level of eight years. Former constitutional officers with less than eight or more than twenty-four years of service would be entitled to difference basic allowances. [8]

As of November 4, 1986, the inflationary factor maintained by PERS for calculation of benefits based upon the 1954 calendar year, pursuant to sec. 9360.9, was 339.8 percent. To calculate the basic retirement of an officer with eight years of service credit PERS would take 40 percent of the incumbent's salary and add to it 40 percent of the incum-

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8. The basic allowance for elected officers is five percent per year of service up to eight years. Officers with 24 or more years of service may receive additional allowances. (Former Sec. 9359.1, Stats. 1969, ch. 776, Sec. 1, pp. 1553-1954.) Most of the retirees who are potentially affected by Proposition 57 receive allowances based upon eight years.

bent's salary times 339.8 percent. The result is that as of November 4, 1986, a retired officer with eight years of service would be entitled to basic retirement benefits of approximately 176 percent of the current incumbent's salary. The calculation may be set forth in the following formula:

> Base = 40 percent times current salary,
>
> Cost of Living Adjustment (COLA) = base times 339.8 percent,
>
> Basic Allowance = base + COLA.

By using this formula we may set forth a comparison of the salaries of incumbents and the basic retirement benefits of retired officers as of November 4, 1986: (1) The Governor's salary was $49,100 and a retired Governor's basic allowance was $86,377 (former sec. 12000, Stats. 1969, ch. 1599, sec. 2.5, pp. 3256-3257); (2) The Attorney General's salary was $47,500

and a retired Attorney General's basic allowance was $83,562 (former sec. 12500, Stats. 1979, ch. 1099, sec. 5, p. 3517); (3) The salaries of the Lieutenant Governor, Treasurer, Controller, Secretary of State, and Superintendent of Public Instruction were $42,500 and retired officers' basic allowances were $74,766 (former sec. 11552.5, Stats. 1977, sec. 1099, sec. 1, p. 3516); and (4) the salary of a member of the Board of Equalization was $68,000 and a retired member's basic allowance was $119,626 (former sec. 11552, subd. (t), Stats. 1983, ch. 803, sec. 10, p. 2935).

The year 1986 was a gubernatorial election year and thus elected constitutional officers were scheduled to begin new terms of office on January 5, 1987. Pursuant to article V, sec. 12, of the state Constitution the compensation of

elected constitutional officers except members of the Board of Equalization cannot be increased or decreased during a term of office. Accordingly, in anticipation of the commencement of the terms of office commencing on January 5, 1987, the Legislature determined to grant salary raises for all elected state officers except members of the Board of Equalization. Members of the Board of Equalization had been granted substantial salary increases effective in 1984. (Former sec. 11552, subd. (t), Stats. 1984, ch. 449, sec. 12, p. 1877.)

In addition to substantial salary increases to take effect upon the commencement of the terms of office beginning in 1987, the Legislature determined for the first time to provide for automatic cost of living adjustments for elected constitutional officers. With

respect to the offices of Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Controller, and Superintendent of Public Instruction, it was provided that upon the commencement of each new term of office the salary for the office would be automatically adjusted by an amount equal to the cumulative cost of living increases granted to state employees over the previous four fiscal years. (Former sec. 11551, Stats. 1983, ch. 803, sec. 7, p. 2934; 11551.5, Stats. 1983, ch. 803, sec. 8, pp. 2934-2935; 11552.5 Stats. 1983, ch. 803, sec. 11, pp. 2935-2936.) The salaries of members of the Board of Equalization, who are not forbidden to receive compensation increases during a term of office, were to be adjusted annually to reflect cost of living increases granted to state employees. (Sec.

11552.5.)

Without Proposition 57 the salary increases which took effect in 1987 would substantially increase the retirement allowances of former officers who took office before 1972. The comparisons between the incumbents' salaries and retirees' basic allowances would be as follows: (1) The Governor's salary was increased by $35,900 to $85,000 and a retired Governor's basic allowance would be increased by $63,155 to $149,532 (sec. 11551); (2) The Attorney General's salary was increased by $30,000 to $77,500 and a retired Attorney General's allowance would be increased by $52,776 to $136,338 (sec. 11551.5); (3) The salaries of the Lieutenant Governor, Secretary of State, Treasurer, Controller, and Superintendent of Public Instruction were increased by $30,000 to $72,500 and the basic retire-

ment allowances for retirees would be increased by $52,766 to $127,542 (former sec. 11552.5, Stats. 1983, ch. 803, sec. 11, pp. 2935-2936). The salaries and retirement benefits of members of the Board of Equalization were not immediately affected by the 1986 election and commencement of the 1987 terms of office, but Proposition 57 would have an effect on them in later years in connection with annual cost of living adjustments for incumbents.

In addition to the immediate increase in allowances, in the absence of Proposition 57 the petitioners and other retired officers in their situation would continue to receive adjustments which are the cumulative product of the cost of living raises granted to state employees and actual changes in the cost of living as measured by the Consumer Price Index.

As a result, with only moderate levels of inflation, the basic benefit levels for retired officers would approach and soon surpass the $200,000 level, and would continue to expand from that level in exponential progression.

The Legislature found this situation unreasonable and intolerable. In an effort to rectify the situation the Legislature proposed an amendment to the state Constitution. The amendment, Proposition 57, passed both chambers of the Legislature without a dissenting vote and was enacted by the voters at the November 4, 1986, General Election. It added section 7 to article III of the state Constitution. That section provides in full:

> "(a) The retirement allowance for any person, all of whose credited service in the Legislators' Retirement System was rendered or was deemed to have been rendered as an elective officer of the state whose

office is provided for by the California Constitution, other than a judge and other than a Member of the Senate or Assembly, and all or any part of whose retirement allowance is calculated on the basis of the compensation payable to the officer holding the office which the member last held prior to retirement, or for the survivor or beneficiary of such a person, shall not be increased or affected in any manner by changes on or after November 5, 1986, in the compensation payable to the officer holding the office which the member last held prior to retirement.

"(b) This section shall apply to any person, survivor, or beneficiary described in subdivision (a) who receives, or is receiving, from the Legislators' Retirement System, a retirement allowance on or after November 5, 1986, all or any part of which allowance is calculated on the basis of the compensation payable to the officer holding the office which the member last held prior to retirement.

"(c) It is the intent of the people, in adopting this section, to restrict retirement allowances to amounts reasonably to be expected by certain members and retired members of the Legislators' Retirement System and to preserve the basic character of earned retirement benefits while prohibiting windfalls and unforeseen advantages which have no relation to the real theory and objective of a sound retirement system. It is not

> the intent of this section to deny any member, retired member, survivor, or beneficiary a reasonable retirement allowance. Thus, this section shall not be construed as a repudiation of a debt nor the impairment of a contract for a substantial and reasonable retirement allowance from the Legislators' Retirement System.
>
> "(d) The people and the Legislature hereby find and declare that the dramatic increase in the retirement allowances of persons described in subdivision (a) which would otherwise result when the compensation for those offices increases on November 5, 1986, or January 5, 1987, are not benefits which could have reasonably been expected. The people and the Legislature did not intend to provide in its scheme of compensation for those offices such windfall benefits.

Pursuant to Prosition 57 the described former constitutional officers and their survivors or beneficiaries will not receive retirement allowance adjustments based upon the salary increases which went into effect on November 5, 1986, or thereafter. They will continue to receive allowances based upon the salary levels prevailing on November 4,

1986, with annual cost of living adjustments under section 9360.9 or 9360.10, whichever applies to them.

Petitioners are among the persons affected by Proposition 57. Petitioner Virginia Knight is the surviving spouse of Goodwin J. Knight, who served as Lieutenant Governor from 1947 to 1953 and as Governor from 1953 to 1959. Petitioner Edmund G. Brown served as Attorney General from 1951 to 1959 and as Governor from 1959 to 1967. Petitioner Wilson Riles served as Superintendent of Public Instruction from 1971 to 1983. Petitioner Richard Nevins served on the Board of Equalization from 1959 to 1987. Petitioner Houston Flournoy served in the State Assembly from 1961 to 1967 and as State Controller from 1967 to 1975. Petitioner Harold Powers served in the State Senate from 1933 to 1953, and as

Lieutenant Governor from 1953 to 1958. Petitioners insist that they have vested contractual rights to receive retirement allowances adjusted both for current salary levels and for increases in the Consumer Price Index (in the cases of all petitioners except Riles, since 1964). They further assert that in future years they are entitled to receive the benefit of both the automatic cost of living adjustments now provided for elected constitutional officers, and the cost of living adjustments provided in sections 9360.9 and 9360.10. They maintain that they are entitled to these benefits regardless how high they may become. They argue that the attempt to deprive them of these benefit levels by the enactment of Proposition 57 constitutes an unconstitutional infringement of their vested contractual rights in violation of

the contract clause of the federal Constitution. (U.S. Const., art. I, sec. 10, cl. 1.) In addition, petitioners Flournoy and Powers assert that even if Proposition 57 is valid. it does not apply to them because they are mixed members, that is, members with credited service in the Legislature and as constitutional officers. We issued alternative writs of mandate in order to consider their claims.

DISCUSSION

I

The Contract Clause.

In Proposition 57 the Legislature and the people made a finding that the dramatic pension increases which would follow from the salary increases to take effect after November 5, 1986, were windfall benefits which could not have been reasonably expected. Proposition 57

was enacted to preserve the basic character of earned retirement benefits while prohibiting windfalls and unforeseen advantages which have no relation to the real theory and objective of a sound retirement system. These findings are adequately supported. Before the 1986 election the affected retired officers were receiving allowances calculated from basic allowances which are not a percentage of current salary levels but are rather multiples thereof, and which are further factored to include automatic annual cost of living adjustments which in most cases outpace actual inflation. Such benefit levels are exceptional on their face and when compared to other governmental pension systems. (See for example sec. 9359.1 [members of the Legislature and officers elected after 1972]; sec. 21250 et seq. [public employ-

ees]; sec. 75075 et seq. [judges]; Ed. Code, sec. 24000 et seq. [teachers.] It is safe to say that other former government employees do not receive retirement benefits that are even remotely similar to the benefit levels claimed by petitioners.

In response to this aberration the Legislature proposed and the people enacted Proposition 57 to add article III, section 7 to the state Constitution. As a part of our Constitution that provision is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. The constitutional amendment must be given effect as the supreme law of the state and neither transient urgency nor abstract practicality can override it. (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28;

Pooled Money Investment Bd. v. Unruh (1984) 15 Cal.App.3d 155, 160.) Obviously statutory schemes cannot override a constitutional provision. To the extent other state constitutional provisions may be inconsistent with Proposition 57 we must give effect to Proposition 57 as the more recent and more specific provision. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637; *Los Angeles Country Club v. Pope* (1985) 175 Cal.App.3d 278, 287.) Accordingly, petitioners must make their claim under the federal Constitution, specifically the contract clause contained in article I, section 10. (See *Allen v. Board of Administration, supra*, 34 Cal.3d at p. 119.)

Article I, section 10, clause 1 of the federal Constitution sets forth certain powers that are prohibited to the states. Among other things that section

provides: "No state shall . . . pass any . . . law impairing the obligation of contracts, . . ." Under the terms of this clause, a "state can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals." (*Woodruff v. Trapnall* (1850) 51 U.S. (10 How.) 190, 206 [13 L.Ed. 383, 390].) And a state constitution is a law of the state within the meaning of the contract clause. (*Bier v. McGhee* (1892) 148 U.S. 137, 140 37 L.Ed. 397].) Thus, "[t]he federal provision applies to any enactment to which the state gives the force of law, including its Constitution." (*Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 779, citations omitted.)

When a claim is presented under the contract clause three questions may arise. First, it must be determined

whether there is a valid contract to be impaired. The contract clause does not protect expectations that are based upon contracts that are invalid, illegal, unenforceable, or which arise without the giving of consideration. (*Crane v. Hahlo* (1921) 258 U.S. 142, 146 [66 L.Ed. 514, 517]; *Ochiltree v. Iowa R.R. Contracting Co.* (1874) 88 U.S. (21 Wall.) 249, 253-253 [22 L.Ed. 546, 548].) Second, if a contract is found, it must be determined whether a challenged law is consistent with its express or implied terms. Modification of contractual rights through subsequent legislation may be consistent with, rather than an impairment of, the contract of the parties. (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 379.) Finally, if impairment is found it must be determined whether the law exceeds the

bounds of the constitutional provision. Not every impairment of a contract will violate the contract clause. Thus, "the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (*Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 782, citations omitted.) And "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." [9] (*Home Build*

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9. In the words of the United States Supreme Court, "it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 241 [57 L.Ed.2d 727, 734].) But no claim is made here that Proposition 57 constituted an exercise of the sovereign power of the government to protect the

ing & Loan Asso., v. Blaisdell (1933) 290 U.S. 398, 435 [78 L.Ed. 413, 427].) Where an exercise of the police power causes an impairment of contract, the California Supreme Court has reiterated four factors identified by the United States Supreme Court in Blaisdell for assessing the constitutionality of the measure. (*Olson v. Cory* (1980) 27 Cal.3d 532, 539.) "Those factors are (1) the enactment serves to protect basic interests of society, (2) there is an emergency justification for the enactment, (3) the enactment is appropriate for the emergency, and (4) the enactment is designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief

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ued...

health or welfare of the people. We have no occasion therefore to consider the police power exception.

period, interest running during the temporary deferment." (*Ibid.*)

In most cases brought under the contract clause the question centers on the existence and nature of the contract rather than upon a construction of the law which is said to impair it. (*Indiana ex rel. Anderson v. Brand* (1937) 303 U.S. 95, 100 [82 L.Ed. 685, 690].) The determination whether a contract exists, and its meaning, requires reference to state law. (Ibid.) When the United States Supreme Court is presented with a claim that a statutory scheme has created a contract, it will exercise independent judgment as to both the existence and meaning of the contract, but in doing so will grant deference to the decision of the highest state court which considered the matter unless that decision is "palpably erroneous" or "manifestly

wrong." (*Hale v. Iowa State Bd. of Assessment and Review* (1937) 302 U.S. 95, 101 [82 L.Ed. 72, 76]; *Phelps v. Board of Education* (1936) 300 U.S. 319, 322-323 [81 L.Ed. 674, 677].) When both the existence of a contract and its terms have been determined by reference to state law, then it may be determined whether a subsequently enacted state law constitutues an impermissible impairment of contract under the federal Constitution.

It is beyond dispute that a state can, through a statutory scheme, create contractual rights which may not be impaired by subsequent legislation. (*Indiana ex rel. Anderson v. Brand, supra*, 303 U.S. at p. 100 [82 L.Ed. at p. 690-691].) However, under the contract clause the presumption is otherwise. As the United States Supreme Court has

observed, "[t]he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." (Ibid.) Thus, it is presumed that a statutory scheme is not intended to create private contractual or vested rights and the one who asserts the creation of a contract with the state has the burden of overcoming that presumption. (*Dodge v. Board of Education* (1937) 302 U.S. 74, 78-79 [82 L.Ed. 57, 62].)

There is nothing inherent in government retirement plans which compels the conclusion that they are protected against modification under the contract clause or other federal constitutional provisions. For example, although the contract clause does not apply to the

federal government, substantially similar considerations are at issue when it is claimed that a challenged law violates due process or constitutes a taking of property without compensation. (*Louisville Joint Stock Land Bank v. Radford* (1935) 295 U.S. 555, 589 [79 L.Ed. 1593, 1604].) Yet federal pensions benefits may be modified or even eliminated because the Supreme Court considers federal pension laws to be social and economic legislation rather than contractual. (*U.S. Railroad Retirement Bd. v. Fritz* (1980) 449 U.S. 166, 174 [66 L.Ed.2d 368, 375].)

The Supreme Court has also upheld modification of state government pension benefits under the contract clause. In *Dodge v. Board of Education, supra*, 302 U.S. 74 [82 L.Ed. 57], the State of Illinois had enacted a statute which

provided for the payment of $1,500 to retired educators "annually and for life." By subsequent legislation the state reduced the annuities to $500. Various educators asserted that the change impaired the obligation of contract in that they "rightly understood the State was pledging its faith that it would not recede from the offer held out to them by the statute as an inducement to become teachers and to retire. . . ." The United States Supreme Court rejected constitutional challenges to the modification, reasoning that the law did not on its face purport to grant contractual rights and under Illinois law such laws were not considered contractual. (302 U.S. at pp. 78-81 [82 L.Ed. at pp. 61-63]; see also *Phelps v. Board of Education, supra*, 300 U.S. at p. 323 [81 L.Ed. at p. 677.)

Lest there be any doubt as to our meaning, we hasten to caution that we do not read these precedents as compelling a particular result in this case. We cite these cases only to demonstrate that federal constitutional principles do not compel the conclusion that all state governmental retirement laws are necessarily contractual or cannot be subject to modification. It is equally true that there is nothing in federal law which would preclude the conclusion that a state retirement law is contractual in nature. Resolution of this question must be by reference to state law and the particular retirement plan at issue.

Over the years there have been enacted in California literally dozens, if not hundreds, of government pension plans. Such plans have been enacted by such entities as state government, local

governments and special districts, and with respect to a wide variety of employees, such as public safety officers, teachers and judges, among others. These plans have differed widely with respect to such things as benefits which may be paid, the manner of funding such benefits, and the legal authority or mandate for the creation of the plan. There is an impressive number of published decisions of the Supreme Court and Courts of Appeal resolving disputes which have arisen under various pension plans. However, these decisions are not necessarily interchangeable. A decision involving a particular plan may be of little guidance in resolving issues presented under a different plan with different provisions. In considering questions arising under a particular plan the first point of reference must always

be to the provisions of the plan at issue. This point has been emphasized by the United States Supreme Court: "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute." (*Dodge v. Board of Education, supra*, 302 U.S. at p. 78 [82 L.Ed. at p. 61].) Decisions involving different pension plans may be persuasive to the extent they involve the same or similar types of legal provisions, but they cannot be regarded as controlling with respect to substantially different statutory schemes.

There can be no doubt that under our law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits. Any doubt on that score may be resolved by reference to

such decisions as (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, *Terry v. City of Berkeley* (1953) 41 Cal.2d 698, and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. Thus, it has been said that an employee may obtain contractual pension rights "when once the government establishes and provides the funds and means for administering it according to its design . . . ." (*Klench v. Board of Pension Fd. Commrs.* (1926) 79 Cal.App. 171, 182. See also *Dryden v. Board of Pension Fd. Commrs.* (1936) 6 Cal.2d 575, 578-579.) In general when a public pension system is either funded or subject to continuing appropriations, it is regarded in California as a form of deferred compensation and vested contractual rights to those benefits attach upon public employment and service. In such a case, the promised consideration gives

rise to vested rights. "Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation." (*Olson v. Cory, supra*, 27 Cal.3d 532, 538.) Thus it has often been said that "[i]t has long been the rule in California that a public employee's pension constitutes an element of compensation and that the right to pension benefits vests upon the acceptance of employment even though the right to immediate payment of a full pension may not be mature until certain conditions are satisfied." (*Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 701.) As the California Supreme Court has noted, a "long line of California decisions has settled the principles applicable to . . . [vested contractual rights to an earned public pension]. A public employ-

ee's pension constitutues an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) And it has been held that where it is feasible to do so the enactment of a pension plan should be construed as guaranteeing full payment to those entitled to its benefits with the provision of adequate funds for that purpose. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351. See also *Carman v. Alvord* (1982) 31 Cal.3d 318, 332.)

These decisions, and others of a similar vein, provide a general rule of construction; they do not impose legal requirements upon a particular pension

plan. For the most part, these judicial declarations presuppose that the pension system is either funded or subject to a continuing appropriation. Moreover, the decisions recognize that a government entity can avoid the application of these general rules by providing otherwise in its retirement law. For example, when the pension plan is an actuarially based retirement system, the public employee's rate of contribution may be increased without providing commensurate added benefits where the system contemplated periodic adoption of contribution rates based upon actuarial investigations. (*International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300-303.) In such a case, there is no impermissible impairment of vested contractual rights because the "revision in the rate of contribution of employees

were made pursuant to the charter and ordinances which delineate a City's retirement system and prescribe the employees' vested rights." (Id. at p. 302, emphasis in original.) Similarly, it has been held that a city's liability for pension benefits will not be limited to the sums available in its pension fund unless it has clearly so provided in its ordinance. (*England v. City of Long Beach* (1945) 27 Cal.2d 343, 348.) By the same token, it has also been recognized that the city's liability will be limited if it does expressly so provide. *Bellus v. City of Eureka* (1968) 69 Cal.2d at p. 352.) In addition, it has been held that a county may not revoke or modify a pension plan in the absence of a reservation of the right to do so. (*Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 214.) But it has also been said: "It

is, of course, true that when a city originally sets up its pension system it has a rather wide latitude in prescribing the terms and conditions for retirement, and it may adopt restrictions that would be considered unreasonable impairments of the contract if subsequently imposed upon employees who have served under the pension plan." (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183; see also *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 644.)

In determining whether a particular pension plan confers vested contractual rights upon employees it may be necessary to take into consideration the governmental entity's legal authority to grant such contractual rights. For example, where a public entity purported to enact a retirement plan but lacked the legal authority to do so, it was held that

employees could gain no contractual rights thereunder. (*Wheeler v. City of Santa Ana* (1947) 81 Cal.App.2d 811, 816.) And persons purporting to contract with the governmental entity are bound to recognize such limitations of power. (Ibid.) Likewise, a pension plan will not be construed to provide a contractual right to specific benefits where to do so would cause it to conflict with more fundamental laws. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 773.) In this last cited case the city had, at different times, enacted a retirement plan and a provision for disability payments to employees injured in the line of duty. After suffering a stroke in the line of duty the defendant insisted that he was entitled to both retirement and disability benefits, which could have resulted in the receipt of greater bene-

fits than the compensation he would have received had he continued working. The Court of Appeal rejected the claim, holding, among other things, that the employee's construction of the city ordinances would render its retirement fund actuarially unsound in contravention of the statutory enabling legislation. (Ibid.)

As these decisions demonstrate, in considering issues presented under the LRL we must refer to the specific provisions of that law and we cannot simply defer to the reasoning of appellate authorities which involved substantially different pension systems. As we shall explain, the LRL is virtually unique among California governmental pension laws. Given this uniqueness, we have considered the LRL and Proposition 57 from several different perspectives, each

of which points to the same conclusion, that Proposition 57 is valid.

We must first consider whether the Legislature's explicit refusal to provide continuous appropriations for the LRL precludes the establishment of vested contractual rights under that retirement system. We hold that it does and that no vested contractual rights subject to impairment may be obtained in those circumstances. We next consider whether, even assuming (contrary to our holding) that vested contractual rights could be obtained in the LRL at the relevant periods of time, retirement benefits could nevertheless be restricted without violating the contract clause when those allowances became wholly unreasonable and constitute an unforeseen windfall bearing no relationship to the real theory and objectives of the retirement system. We

conclude that under those rare circumstances the benefits could be decreased to reasonable yet substantial levels without constituting an impairment. Finally, we consider the doctrine of comparable new advantage both in the context of a retirement system with vested contractual rights and one without. In a vested system, we conclude that when the retirement benefits do not reach such levels so as to constitute unforeseen windfalls subverting the system, they may be reduced only if a comparable new advantage is provided to offset the reduction. Under an unvested system, no such offset is required since it is in all events contingent upon yearly appropriations. Despite its nonvested status, by enacting a continuing appropriation for the payment of benefits with an annual cost of living

adjustment, Proposition 57 converted the LRL from a nonvested system to a vested one and thereby granted a comparable new advantage to offset the lost but contingent windfall benefits. Our analysis follows.

A.

The Necessity for an Appropriation.

In California, governmental retirement plans are typically funded by (1) the creation of an actuarially based retirement fund, (2) a provision for continuous appropriations or continuing obligations of the government entity, or (3) some combination of both. (See, e.g., sec. 20751, 20752 [state employees]; 31963, 31964, 32029-32032 [county employees]; 45342, 45343 [city employees]. See also 49 Cal.Jur.3d (1979) Pensions and Retirement Systems, sec. 11, pp. 224-225.)

Where it is feasible to do so, a governmental retirement law will be construed as providing adequate funds or a continuing appropriation for the payment of benefits as they fall due. (*Carman v. Alvord, supra*, 31 Cal.3d at p. 332; *Bellus v. City of Eureka, supra*, 69 Cal.2d at p. 351.)

In the manner of funding, the LRL, as it was enacted and in effect throughout the period for the extraordinary benefits claimed by petitioners, was virtually unique among California governmental pension plans. In enacting the LRL the Legislature did not provide for an actuarially based fund, nor did it provide for continuous appropriations for the payment of benefits. Instead, funding for the payment of benefits was left to future year-to-year appropriations. (Former sec. 9358, Stats. 1947, ch. 879,

sec. 1, p. 2062.) In doing so, as we have noted, the Legislature expressly provided: "The provisions of Section 9358 do not constitute an appropriation of money from the State Treasury. The sum required for state contributions shall be appropriated in each State Budget Act, or otherwise." (Former sec. 9358.1, Stats. 1947, ch. 879, sec. 1, p. 2062.)

We requested supplemental briefing to address the question whether, in view of the unique but express refusal of the Legislature to appropriate funds to support the LRL, the petitioners could be said to have obtained vested contractual rights to specific formulae for the calculation of benefits. The response took two forms. First, it was asserted that the LRL is not unique but is identical to all other types of governmental retirement plans. Second, it was assert-

ed that the state cannot be permitted to breach contractual rights by refusing to appropriate funds. The first assertion is unconvincing and the second addresses a question we did not ask.

Initially we must clarify some apparent confusion over the nature of our inquiry. It has been suggested, particularly by amicus curiae, that the distinction we perceived between the LRL and other retirement laws was in whether the law called for funding on a "pay-as-you-go" basis, rather than through an actuarially based fund. For our purposes this is not a relevant distinction. If the Legislature chooses to create a contractual retirement system, it is free to provide for the payment of future benefits from future revenues by enacting a prospective and continuing appropriation. (See *Humbert v. Dunn* (1890) 84 Cal. 57,

60.) However, in the LRL, unlike other governmental pension plans, the Legislature not only left the payment of benefits to future appropriations, it expressly provided that the law was not an appropriation for the payment of benefits.

Contrary to petitioners' assertions, the LRL is not like other governmental retirement plans. Petitioners attempt to compare the LRL to retirement plans for judges, state employees (PERS), and teachers (TRS). We find those plans to be fundamentally different than the LRL. In 1937 the Legislature established a Judges' Retirement Fund and provided for personal and governmental contributions into the fund. The measure also provided an unambiguous appropriation by providing that the State Treasurer "shall cause warrants to be drawn upon the State

treasury in favor of each retired justice or judge for the amount of the retirement allowance to which he shall be entitled." (Stats. 1937, ch. 771, sec. 7, p. 2207.) In 1951 the Legislature amended the Judges' Retirement Act to provide that on an annual basis the Legislature would be required to pay into the Judges' Retirement Fund any amount by which the accumulations in the fund would be insufficient to pay all retirement allowances due under the law. (Stats. 1951, ch. 532, sec. 10, p. 1684, see former sec. 75107, added by Stats. 1953, ch. 206, p. 1339.) In so providing the Legislature used no words of limitation such as it used in the LRL. Under established principles the Judges' Retirement Law must be considered to be supported by a continuous appropriation. (*Carmen v. Alvord, supra*, 31 Cal.3d at p. 332; *Bellus v. City of Eureka, supra*, 69

Cal.2d at p. 351.) Moreover, unlike the LRL, the Legislature is constitutionally compelled to establish and fund a retirement plan for judges. (Cal. Const. art. VI, sec. 20.)

The funding for PERS and TRS is complicated due to the varieties of governmental employers and employees governed thereby. Benefits under each system are paid from an actuarially based fund. Both employers and employees con tribute to the fund during the period of employment. In establishing the funds the Legislature provided that employer contributions are continuing obligations. (See sec. 20740 et seq.; Ed. Code, sec. 23400 et seq.) The Legislature used no words of limitation to indicate that either system is not to be supported by continuing appropriations or is otherwise not to be construed as a continuing

obligation of the employing governmental entity.

With respect to the TRS there was at one time a provision with respect to one aspect of the plan in which the legislature did decline to make a continuing appropriation. This was not with respect to funding for TRS in general; rather it was limited to the state's contribution to the fund. The TRS is funded primarily by contributions from members and employing agencies. In 1969 the Legislature provided for state contributions to the fund, but also expressly stated that the provisions for state contributions were not to be considered appropriations. (Former Ed. Code, sec. 14113, Stats. 1969, ch. 896, sec. 2, p. 1771.) That situation is inapposite here. In the Teachers' Retirement Law the Legislature indicated a clear intent that teachers

were to obtain contractual rights to their retirement benefits. The Legislature refused to make a binding appropriation with respect to only one form of reserve funding rather than for all government funding of benefits and that limitation cannot be held to control the entire retirement law. We will further address this provision in a subsequent portion of this discussion.

We have examined legislation with respect to a variety of governmental pension plans. (See, e.g., Gov. Code, sec. 31450 et seq., 31900 et seq., 32300 et seq., 45300 et seq., 50800 et seq.; Publ Util. Code, sec. 12301 et seq., 25301 et seq., 28870 et seq.; Wat. Code, sec. 71593 et seq.) Among California retirement laws the LRL appears unique in that the Legislature did not establish an actuarially based fund for the payment of

benefits and expressly declined to support the law with a continuing appropriation. It is the effect of this unique provision that we must consider and upon this question judicial decisions involving other types of retirement systems will not necessarily be controlling.

In our request for supplemental briefing we asked the parties to address the question whether a contractual right to a specific formula for the calculation of pension benefits can be obtained where the Legislature has expressly refused to provide an appropriation to support the payment of such benefits. Petitioners reworded the inquiry and addressed the question whether the Legislature can permissibly impair a vested contract right by failing to provide funds. This is not the question we asked, nor one we would need to ask. There is no question

that the Legislature cannot avoid state contractual obligations by repealing the appropriations which supported them. (See *Riley v. Johnson* (1933) 219 Cal. 513, 521; *McCauley v. Brooks* (1860) 16 Cal. 11, 34.) As the McCauley court explained it, "[t]he appropriation once made--the funds to meet it having been provided and received into the treasury--the Legislature cannot, by revoking the appropriation, prohibit the Treasurer from making the payments designated. [ ] We admit that the Legislature possesses the entire control and management of the financial affairs of the State; that it can levy such taxes as it may deem expedient, subject only to the constitutional requirements of equality and uniformity, and devote the proceeds of the taxation to such specific objects as it may think proper. But we deny that

after having made an appropriation in view of a contemplated contract to be based thereon, and such contract is made, and funds to meet the appropriation are received into the treasury, it can deprive the party with whom the contract is entered into of such funds by repealing the appropriation." (16 Cal. at p. 34.)

Our inquiry, however, was more fundamental. The question is whether anyone can obtain vested contractual rights to specific payments from the state when the Legislature expressly declined to enact an appropriation in support of the alleged contract. We think the answer is clear - they cannot.

The appropriation rule is set forth in article XVI, section 7 of the state Constitution, which provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a

Controller's duly drawn warrant." The rule is a fundamental aspect of our form of government. "It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament; and the system worked so well in correcting the abuses complained of, our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union." (*Humbert v. Dunn, supra*, 84 Cal. at p. 59, citation omitted.)

The appropriation rule leads to this well-settled proposition: in the absence

of an existing or continuing appropriation no one can obtain vested contractual rights against the government. For example, in *Sutton v. United States* (1920) 256 U.S. 575 [65 L.Ed. 1099], a claim was made against the federal government for work performed pursuant to an alleged contract. The Supreme Court held that in the absence of a prior appropriation for payment for work to be performed a contractor cannot obtain express or implied contract rights against the government. To the extent money has been appropriated for work a contractor may obtain contractual rights to payment, but only up to the amount appropriated. And persons who deal with the government must be held to have notice of this limitation upon the authority to enter into contracts. (Id. at pp. 578-579 [65 L.Ed. at p. 1102].)

Similarly, in *Leiter v. United States* (1925) 271 U.S. 204 [70 L.Ed. 906], the claimant and the Treasury Department, on behalf of the Veterans' Bureau, purported to enter into four multiple-year leases with provisions for stipulated rental payments. However, at the time of the purported leases there existed an appropriation for the payment of but one year's rent. After the first year the government vacated the properties and the claimant sought to hold it liable for the remaining term of the leases. The Supreme Court rejected the claim, holding that in the absence of an existing appropriation the government has no authority to enter into a contract and even if it purports to do so no binding obligation can be incurred. (Id. at pp. 206-207 [70 L.Ed. at p. 907]. See also United States v. Jones (1886) 121 U.S.

89, 99-100 [30 L.Ed. 861, 862-863]; *Bradley v. United States* (1878) 98 U.S. (8 Otto) 104, 114-115 [25 L.Ed. 105, 107].) Moreover, even if an appropriation should become available for payment of the lease in subsequent years there will still be no contractual right to payment unless the government, through its duly authorized officers, affirmatively continues the lease under authority of the appropriation. (*Leiter v. United States, supra*, 271 U.S. at pp. 206-207 [70 L.Ed. at p. 907].) In Leiter, a subsequent lump sum appropriation was made for rental expenses of the Veterans' Bureau but the claimant still had no contractual right to payment because the leases were not continued under the appropriation either by specific agreement or by occupation of the premises. (Id. at p. 208 [79 L.Ed. at p. 908].)

California law is in general accord with this appropriation principle. Under our law it has been held that no enforceable contract obligation can be incurred in the absence of a valid appropriation or compliance with constitutional prerequisites for incurring a debt or liability. (See *Ingram v. Colgan* (1895) 106 Cal. 113, 118-119; *Humbert v. Dunn, supra*, 84 Cal. at p. 59; *McCauley v. Brooks, supra*, 16 Cal. at p. 34; *Myers v. English* (1858) 9 Cal. 341, 349. See also *In re City and County of San Francisco* (1925) 195 Cal. 426, at 443-444, [holding void a contract made without compliance with charter provisions for funding the obligation]; see generally, *People v. Pacheco* (1865) 27 Cal. 175, 210-221.)

In this state the appropriation rule operates in conjunction with constitutional debt limitation provisions.

Article XVI, section 1, of our state Constitution provides, in relevant part: "The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars ($300,000), except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and

discharged, . . . but no such law shall take effect unless it has been passed by a two/thirds vote of all the members elected to each house of the legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; . . "

This debt limitation provision has been in our Constitution since the earliest days of California's statehood. (See Cal. Const., former art. VIII; *People v. Johnson* (1856) 6 Cal. 499, 500.) It was originally believed that legislative appropriations were subject to the debt limitation provisions. For example, in Johnson the Legislature authorized a contract for the building of a road and enacted an appropriation for that purpose. The appropriation together with

previous state debts would have exceeded the aggregate $300,000 limitation. The Supreme Court read the constitutional debt limitation provisions restrictively and concluded that an attempted appropriation in excess of those limits without compliance with constitutional procedures, including a vote of the people, would violate the Constitution. Accordingly, the attempted appropriation was void and no valid contract could be created. (6 Cal. at pp. 502-503.)

A similar result was reached in *Nougues v. Douglass* (1857) 7 Cal. 65. There the Legislature authorized a contract for the construction of a state capitol at a cost not to exceed $300,000. The contractor was to be paid in state bonds as the work progressed and the commissioners were directed to draw their warrants on the State Controller in favor

of the contractor from time to time. At the time of this enactment, the cumulative state debt was at the $300,000 limitation. The high court found both the legislation and the challenged contract to be void. "The power to pay is a necessary incident to the power to contract, and they both must stand or fall together." (7 Cal. at pp. 70-71.)

The view expressed in the Johnson and Nougues cases that the legislative power of appropriation is subject to the constitutional debt limitation provisions, was quickly reversed. In *State of California v. McCauley* (1860) 15 Cal. 429, the Legislature had directed a board of commissioners to enter into a contract for the lease and management of the state prison for a period of five years. Later, when the state attempted to terminate the contract and take over manage-

ment of the prison, it was asserted that the contract was void since the attempted appropriation would exceed constitutional debt limitations. This time, the court rejected the argument. The appropriation in support of the contract operated in the nature of a payment, anticipating and discharging liabilities as they arose and thus preventing them from being a debt within the meaning of the constitutional provision. (15 Cal. at pp. 454-455.) As the court explained it, "revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the Treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates

in fact in the nature of a cash payment." (Id. at p. 455.)

A similar result occurred in *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 248. There the Legislature was providing for the construction of a state capitol. It provided by statute that the construction of the capitol would not exceed $500,000, and as an initial step, had given the commissioners the authority, supported by an appropriation, to contract to the extent of $100,000. In an action challenging the law, the Court concluded that contracts up to $100,000 would not implicate debt limitation provisions because there was an appropriation to pay such obligations as they arose. The provisions for a total cost of $500,000 did not violate debt limitation provisions because that was only a statement of policy which did not author-

ize any contract. Before liabilities in excess of the $100,000 appropriation could be incurred, the Court further opined, additional legislation would be required. (16 Cal. at p. 253.)

The relationship between our constitutional appropriation rule and the constitutional debt limitation provisions was restated and explained in *People v. Pacheco, supra*, 27 Cal. at pages 210 to 221. There the court explained that when the Legislature authorizes a contract and provides an appropriation to pay it, the whole is regarded as a single financial transaction and no debt or liability within the meaning of our constitutional debt limitation provisions arises. For this purpose, the Legislature can provide a continuing appropriation, thereby anticipating the receipt of revenues and appropriating them for the payment of

sums to become due under a contract. Conversely, where the Legislature fails to provide a valid appropriation, then both the law and purported contract thereunder are void unless the constitutional requirements for incurring a state debt or liability are fulfilled. (27 Cal. at pp. 218-220. See also *Riley v. Johnson, supra*, 219 Cal. 513, 520-521.)

As these authorities demonstrate, our state Constitution provides limitations upon the manner in which the state can incur valid contractual obligations. The means by which the state can incur contractual obligations can be grouped into the following four categories: (1) by legislative authorizations supported by an appropriation, in which case no debt is incurred; (2) by legislative authorization without an appropriation where the liability created will not

cause aggregate state liabilities to exceed $300,000; (3) by legislative authorization in case of war to repel invasion or suppress insurrection; or (4) by compliance with the constitutional prerequisites of article XVI, section 1, which include approval by the voters at a general election or direct primary.

There is no question that upon its enactment the benefits to be paid under the LRL were far in excess of the $300,000 limit upon the Legislature's power to incur debts or liabilities without voter approval. It is equally obvious that the LRL was not enacted in the case of war or to suppress insurrection. Moreover, the Legislature did not attempt to comply with the constitutional prerequisites for incurring liabilities. Accordingly, in order for the Legislature to have caused the state to incur con-

tractual obligations under the LRL, it must have appropriated funds for payment of the the benefits as they became due. However, in enacting the LRL the Legislature considered but expressly declined to enact an appropriation for the payment of benefits. This express legislative determination is convincing proof that in enacting the LRL the Legislature did not intend to vest members with a contractual right to the payment of specific benefits. Instead, the LRL is like our early statutory plan for constructing a state capital (*Koppikus v. State Capitol Commissioners, supra*, 16 Cal. 248), federal pension laws (*U.S. Railroad Retirement Bd. v. Fritz, supra*, 449 U.S. at p. 174 [66 L.Ed. at p. 375], and the former Illinois's teacher annuity law (*Dodge v. Board of Education, supra*, 302 U.S. at pp. 78-81 [82 L.Ed. at pp. 61-63]). In

short, as originally enacted the LRL was a statement of state policy which was subject to legislative modification or repeal; it did not authorize the state to incur contractual obligations for the payment of specific benefits to petitioners.

A quartet of recent decisions can serve to illustrate the application of the appropriation rule. In 1982, the Legislature attempted to balance the state budget by curtailing the state's contributions to PERS for state employees and teachers and it was alleged that employees and teachers had a contractual right to have the state make its contributions. In *Valdes v. Cory* (1983) 139 Cal.App.3d 773, we responded: "To determine whether there is such a contractual obligation on the part of the public employer, we must look to the legislative

history and current provisions of the retirement law. A statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly '. . .evince a legislative intent to create private rights of a contractual nature enforceable against the State.'" (Id. at p. 786.) We considered statutory provisions applicable to PERS and found a clear intent that the State's contributions were to be a continuing contractual obligation of the state. Accordingly, the Legislature could not lawfully avoid the obligation by repealing the existing appropriation for those contributions. (Id. at p. 787.)

We have already discussed some aspects of the Teachers' Retirement System. That system is funded primarily through contributions of teachers and

their employers. In 1971 it was discovered that the system was not actuarially sound, that is, assets in the fund were insufficient in view of the liabilities. The Legislature provided for the state to make annual contributions to the system for a period of years, but expressly said that the provision for these contributions was not an appropriation. In 1979, after Proposition 13 had reduced the revenues available for public school financing from local property taxes, the Legislature repealed the provision stating that state contributions to TRS were not an appropriation. In its place the Legislature enacted a continuing appropriation for specific state contributions to TRS. In later years the state attempted to avoid its obligation for contributions. In *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494,

at pages 506 and 507, we held that for the state to reduce or eliminate its contributions to TRS would unlawfully impair the contractual rights of teachers. Pivotal to our decision was the fact that the Legislature had repealed the provision that state contributions were not to be considered a continuing appropriation and had made a binding commitment to permanent funding. "In the enactment creating the obligation the provisions of the law conditioning the funding upon appropriations in the State Budget Act were repealed. By these means a commitment to permanency of funding was made. Given this commitment to permancency of funding and the critical importance which funding bears to the capacity of the state to fulfill the underlying contractual promise to pay the pensions, we imply a promise of funding in ex-

change for the valuable services rendered by the state's teachers. . . . This palpable element of exchange results in a contractual 'promise,' i.e., an intent to confer private rights." (Id. at p. 506, citations omitted.)

In contrast to these decisions are a pair of decisions of approximately a decade earlier. In *California State Employees' Assn v. State of California* (1973) 32 Cal.App.3d 103, the plaintiff sought to compel the state to pay salary increases to employees of the state, the state university, and the University of California. At that time the controlling statutory law required the State Personnel Board and the trustees of the state university to establish and adjust salaries with consideration of prevailing rates for comparable service in other public and private employment. The

Regents of the University of California were vested with authority over the organization and government of the university by the state Constitution. The plaintiff, California State Employees' Association, contended that these provisions compelled the governmental defendants to make salary adjustments which neither the Legislature nor the Governor could refuse to honor. This court rejected the claim. Although the Legislature had provided a statutory framework for the adjustment of salary levels, that process was contingent upon the willingness of the Legislature to appropriate money and upon the possible exercise of the Governor's veto power. Consequently, absent an appropriation, the employees had no enforceable rights to salary adjustments. (Id. at pp. 108-109.)

In California State Employees' Assn.

v. Flournoy (1973) 32 Cal.App.3d 219, the plaintiff sought to compel the payment of salary increases for faculty and academic employees of the University of California and the California state colleges. It appeared that the Regents of the University of California and the trustees of the state colleges had approved salary increases and had sought funds from the Legislature for those increases, but the Legislature specifically declined to provide funds for those increases in the State Budget Act. The plaintiff asserted that pursuant to the statutory scheme for the determination of salary levels and long-standing custom and procedure, the employees had a vested right to payment of the salary increases. The claim was rejected.

Petitioners seek to distinguish *California State Employees' Assn. v.*

State of California, supra 32 Cal.App.3d 103 and *California State Employees' Assn. v. Flournoy, supra*, 139 Cal.App.3d 773 and *California Teachers Assn v. Cory, supra*, 155 Cal.App.3d 494 by pointing out that the former cases involved salary levels while the latter cases involved pension systems. They cite the general rule that a government employee has no contractual right to the payment of a specific salary or for salary adjustments. (See *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150-151; *Pennie v. Reis* (1889) 80 Cal. 266, 269.) They also cite the general rule that pension benefits are considered contractual. Such an approach, however, is too simplistic. We have already noted that there is nothing inherent in the concept of a government pension system which compels the conclusion that in all cases a law creating

such a system must be regarded as creating contractual obligations for the payment of specific benefits. There is also nothing inherent in the concept of government employment which precludes the conclusion that a salary or the right to salary adjustments is contractual. (See *Olson v. Cory, supra*, 27 Cal.3d 532, 538-539; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304-305.) Thus, in every case, and with respect to every statutory scheme, be it for salary adjustments or pension benefits, the primary consideration must be the express language used by the Legislature. We must consider whether the language used evinces a legislative intent to create private rights of a contractual nature enforceable against the state. (*Valdes v. Cory, supra,* 139 Cal.App.3d at p. 786.)

It is true that with respect to virtually every governmental pension system in this state, except the LRL, the Legislature has chosen to provide for contractual obligations in favor of workers. It is also true with respect to the majority of local governmental pension systems. And, as a matter policy, we are constrained to construe a retirement law as providing for continuing contractual obligations where it is feasible to do so. (*Carmen v. Alvord, supra*, 31 Cal.3d at p. 332; *Bellus v. City of Eureka, supra*, 69 Cal.2d 351.) But at the same time a legislative body is not freed from its duty of following appropriate legal procedures for creating contractual rights simply because it may be dealing with a pension system. (*Wheeler v. City of Santa Ana, supra*, 81 Cal.App.2d at p. 816. See also *Dryden v.*

Board of Pension Commrs, supra 6 Cal.2d at p. 579-580; *Klench v. Board of Pension Fd. Commrs., supra*, 79 Cal.App. at p. 182.) Nor can we ignore the express limitations in the particular retirement law we are considering. It is, therefore, a matter of first importance to examine the specific language utilized by the Legislature. (*Dodge v. Board of Education, supra*, 302 U.S. at p. 78 [82 L.Ed. at p. 61].) It follows, then, that when the challenged retirement system differs from those described in the cases dealing with other pension plans, reliance upon those authorities "is misplaced." (*International Assn of Firefighters v. City of San Diego, supra*, 34 Cal.3d 292, 303.)

In enacting the LRL the Legislature chose a statutory format unlike any other governmental pension system in this

state. It did not create an actuarially based fund from which benefits might be paid and instead provided for payment of such benefits on a year-to-year basis from appropriations in the State Budget Act or otherwise. "It is freely conceded that the use of technical words in a statute is not necessary to create an appropriation. But while no set form of language is requisite, upon the other hand there are some things which plainly enough are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not appropriation. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment." (*Ingram v. Colgan, supra*, 84 Cal. at p.

118.) Whatever room for doubt there may otherwise have been, in enacting the LRL the Legislature expressly declined to make a continuing appropriation for the payment of its benefits. (Former sec. 9358.1, Stats. 1947, ch. 879, sec. 1, p. 2062.) There is only one conceivable legislative purpose for such a provision, and that would be to retain legislative control over the payment of those benefits. It thus appears that in enacting the LRL the Legislature intended to withhold an essential ingredient for the perfection of contractual rights to a specific formula for the calculation of benefits, and this is the clear result under our Constitutions' requirement of an existing appropriation for the creation of contractual rights.

Our conclusion is not affected by the subsequent revision of the LRL. As

we have noted, in 1971 the Legislature began to take steps to revise the LRL into a funded, actuarially sound system. In the early 1970's the Legislature provided that benefits for officers elected in 1972 or thereafter would not be based upon compensation in excess of that actually earned by the officer while in office. (Former sec. 9359.13, Stats. 1971, ch. 1277, sec. 4, p. 1277.) It declared an intent to make the LRL fully funded and actuarially sound by the year 2002. (Former sec. 9358.5, Stats. 1972, ch. 539, sec. 1, p. 929.) It further required PERS to conduct an actuarial evaluation and to make recommendtions for financing the LRL. (Sec. 9354.5, Stats. 1972, ch. 1192, sec. 1, 2313.) Eventually, effective January 1, 1978, the Legislature provided for monthly state contributions to a fund in the amount of 18.81

percent of the compensation paid to members of the system. (Sec. 9358, Stats. 1977, ch. 937, sec. 2, p. 2864.) The Legislature enacted an appropriation for the payment of these contributions. (Ibid.) Thus, the Legislature's revision of the LRL to make it an actuarially sound system proceeded in two separate ways. First, it sought to eliminate windfall benefits and to restrict members to retirement allowances consistent with the purpose and functioning of a sound retirement system. Second, it established an actuarially based fund and provided for a continuing appropriation for state contributions into the fund to support these benefits.

Nothing in this scenario suggests that the Legislature intended to confirm in petitioners a contractual right to continue to receive windfall adjustments

unrelated to the sound functioning of a retirement system. Such a conclusion would be inconsistent with general principles of contract law which hold that a promise to pay additional compensation after a service has been rendered is without consideration and is unenforceable. (*Dow v. River Farms Co.* (1952) 110 Cal.App.2d 403, 408.) [10] This rule is built into the federal contract clause. (*Pearsall v. Great Northern R. Co.* (1895) 161 U.S. 646, 666-667 [40 L.Ed. 838, 845].) And it finds expression in our state Constitution. (Cal. Const. art. IV,

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10. In some instances a preexisting moral obligation will be considered sufficient consideration to support a subsequent promise. However, in such cases the subsequent promise is enforceable only to the extent necessary to do justice and not otherwise. (See Civ. Code, sec. 1606; *Herbert v. Lankershim* (1937) 9 Cal.3d 409, 465; Rest.2d, Contracts, sec. 86.) A claim based upon a moral consideration might support a claim for a substantial and reasonable pension, but it would not support a claim for extraordinary windfalls.

sec. 17, formerly art. IV, sec. 32.) It has frequently been applied to preclude governmental employees from asserting contractual rights under subsequently enacted legislation. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 23, 27; *Simpson v. Cranston* (1961) 56 Cal.2d 63, 69-70; *Lamb v. Board of Peace Officers, etc.* (1938) 29 Cal. App.2d 348, 350.) In view of these authorities we are constrained against construing the revision of the LRL as an attempt to retroactively vest petitioners with a contractual right to extraordinary benefits unless such an intent is apparent. Any such intent is glaringly absent here, since in revising the LRL the Legislature has consistently attempted to curtail rather than confirm windfall benefits.

We also do not find that petitioners Riles and Nevins obtained a contractual

right to the payment of extraordinary benefits by working past the revision of the LRL. The above authorities apply equally to Riles and Nevins even though they were still employed at the time of the revision. (*Longshore v. County of Ventura, supra*, 25 Cal.3d at p. 23.) Moreover, it is a general rule of contract law that an offer for a contract must be accepted upon the terms proffered. (Civ. Code, sec. 1585; *Love v. Gulyas* (1948) 87 Cal.App.2d 608, 613.) By the time the Legislature enacted a continuing appropriation to support the LRL it had already acted to curtail the possiblity that members would accrue rights to extraordinary windfall benefits. Riles and Nevins could obtain contractual rights to the benefit levels then provided by continuing to work, but they could not insist on obtaining addi-

tional rights. This is not to say that they forfeited their claims to benefits for prior work; it is merely to hold that they did not obtain additional contractual rights to prior windfall benefits by working under the revised LRL.

In this case we need not and do not hold that petitioners are wholly at the mercy of legislative fiat for the payment of retirement benefits. While the failure to provide an appropriation would preclude petitioners from obtaining express or implied contractual rights to a specific formula of benefits, it would not necessarily preclude them from asserting the right to reasonable and substantial pension benefits on a quasi-contract theory (*Sutton v. United States, supra*, 256 U.S. at p. 581 [65 L.Ed. at p. 1102], or through an estoppel (*City of Long Beach v. Mansell* (1970) 3 Cal.3d

462, 496-497). But while such theories may support a claim to substantial and reasonable benefits, they would not entitle petitioners to obtain an unfair advantage by insisting on the payment of benefits pursuant to a set formula regardless of how extraordinary and excessive those benefits may have become. (See *Peskin v. Phinney* (1960) 182 Cal. App.2d 632, 636.) And claims based upon quasi-contract or estoppel will not support a claim for benefits pursuant to a strict formula under the federal contract clause. (*Freeland v. Williams* (1888) 131 U.S. 405, 414 [33 L.Ed. 193, 197]; *Louisiana v. Mayor, etc., New Orleans* (1883) 109 U.S. 285, 289-290 [27 L.Ed. 936, 938].)

In Proposition 57 the Legislature and the people exercised the power over LRL benefits which was retained when the

LRL was enacted. In doing so they expressly reaffirmed petitioners' right to receive substantial pension benefits. These benefits were preserved at the already extraordinary levels to which they had risen as of November 4, 1986. Moreover, these benefits would continue to be adjusted annually, at a minimum, to offset any increase in the cost of living. Since, in enacting the LRL, the Legislature retained control over the payment of benefits by refusing to provide for a continuing appropriation, it follows that it had the power to act to preclude LRL allowances from including unexpected and unfair windfall adjustments. We therefore hold that Proposition 57 does not impair any vested contractual rights of petitioners in violation of the Contract clause.

B.

Contractual and Constitutional Principles Governing Reduction of Vested Pension Systems.

We next consider whether, even assuming for the sake of argument that petitioners obtained vested contractual rights in the LRL, their retirement benefits could be reduced without violating the contract clause. In making this assessment of the LRL we find applicable certain principles of contract law which have been given constitutional significance under our state Constitution. These principles are related to the requirement of consideration. It is a general rule of the law of contracts that a promise to pay compensation in excess of that called for in the contract is not enforceable. (*Pacific Finance Corp.* v. *First Nat. Bk.* (1935) 4 Cal.2d 47, 49-50; *Williams Constr. Co.* v. *Standard-Pacific Corp.* (1967) 254 Cal.App.2d 442, 453.)

As a corollary of this rule, it is held that a promise to pay additional compensation after a service has been rendered is without consideration and is unenforceable. (*Dow v. River Farms Co., supra*, 110 Cal.App.2d at p. 408.) The federal contract clause incorporates the general rule: "The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license." (*Pearsall v. Great Northern R. Co., supra*, 161 U.S. at p. 667 [40 L.Ed. at p. 845].) The general rule has been given constitutional dimension in this State as well: "The Legislature has no power to grant, or to authorize a city, county, or other public body to grant, extra compensation or extra allowance to a public officer,

public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State, or a city, county, or other public body under an agreement made without authority of law." (Cal. Const., art. IV, sec. 17, formerly art. IV, sec. 32.)

Another provision of our Constitution, applicable to elected constitutional officers except members of the Board of Equalization, provides: "Compensation of the Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Superintendent of Public Instruction, and Treasurer shall be prescribed by statute but may not be increased or decreased during a term." (Cal.Const., art. V, sec. 12, formerly art. V, sec. 22.)

The application of these principles may be illustrated by reference to decisional authorities. In *Martin v. Henderson* (1953) 40 Cal.2d 583, the plaintiff had accrued various overtime credits at a time when the applicable statutory law did not provide for payment for overtime. After a statute was enacted to provide for cash payment for accrued overtime the plaintiff sought payment for overtime he had accrued prior to the effective date of the provision. The Supreme Court held that the Legislature could not lawfully provide for payment for overtime which had already accrued because to do so would be to provide extra compensation for services already performed. (Id.at p. 591; see also *Longshore v. County of Ventura, supra*, 25 Cal.3d at pp. 23, 27; *Simpson v. Cranston, supra*, 56 Cal.2d at pp. 69-70.) Similarly, where the Legis-

lature attempted to allow legislative porters compensation in excess of their statutory allowance due to a period of 12-hour-per-day sessions, the Supreme Court found the additional allowance to be unlawful as either a gift or extra compensation after services had been performed. (*Robinson v. Dunn* (1888) 77 Cal. 473, 475.) In *Lamb v. Board of Peace officers, etc., supra*, 29 Cal.App.2d at page 350, the court held that a county could not legally grant a disability pension to an officer who became disabled when there was no retirement act in force. And in an opinion on the Judges' Retirement Law, the Attorney General concluded that a judicial pension could not be extended lawfully to a former judge who had been a member of the Judges' Retirement System, but who had left office before he met the age or

disability requirements for immediate retirement and at a time when the law did not provide for deferred retirement. (32 Ops.Cal.Atty.Gen. 131 (1958).)

These rules are not invariably violated by a subsequent agreement or legal enactment which might seem to confer additional compensation after services are rendered. A legislative body may expressly or impliedly retain the power to adjust compensation even after services have been rendered. For example, where a governing body engaged in salary negotiations with its employees after an existing contract expired and the employees continued to work at prior salary levels pending resolution of negotiations, the new salary levels could be made effective from the date of the expiration of the old agreement. (*Goleta Educators Assn. v. Dall'Armi* (1977) 68

Cal.App.3d 830, 834; *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 88.) And the legislative body will be held to have the power to make retroactive adjustment of compensation levels where it can be said that the employees worked with justifiable uncertainty regarding their levels of compensation (*Jarvis v. Cory* (1980) 28 Cal.3d 562, 579.)

From time to time it has been asserted that increases in pension allowances violate constitutional principles. The general rule which has developed holds that a governing body does have the power to grant increases in pension levels without violating constitutional provisions. These cases proceed upon the premise that pension legislation should be liberlly construed to give effect to its purposes which include, in a proper

case, protection of the pensioner and his dependents against economic insecurity. It is thus held that as a result of service an employee may obtain "a pensionable status" and can legally receive increases in benefit levels which the Legislature, in its discretion, may determine to provide in view of changing conditions and circumstances in the economic world. (*Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292, 296, 298. See also *Brummund v. City of Oakland* (1952) 111 Cal.App.2d 114, 118-119, 121.) In *Sweesy v. L.A. etc. Retirement Bd.* (1941) 17 Cal.2d 356, at page 362, the high court said, as partial justification for the rule: "There is some language in the decisions which refers to pension benefits as additional or increased compensation for services performed and to be performed. [Citations.] But that desig-

nation may not be strictly accurate in every case. As in this case, the members of the system make contributions to the pension fund, even though contributions may also come from public funds. Such systems are usually founded on actuarial calculations. Therefore, the question of what benefits would be warranted by either the individual or mass contributions to the fund is for the legislative body, and not for the pension board or the courts, whose respective functions in such cases are to administer and interpret the provisions of the law as written." [11]

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11. These earlier decisions were not concerned with whether a governing body was required to grant pension increases but rather considered whether such increases could be granted without violating constitutional prohibitions. In these cases the legislative body had provided for increases for pensioners but the system administrator or other functionary refused to pay them. In holding that the increases were lawful the courts indicated that they could also be withheld by the

A similar theory has also been applied to the LRL with respect to the prohibition against increasing compensation during a term of office. When, in 1949, the Legislature expanded the LRL to include elected constitutional officers, PERS asked the Attorney General whether it could be granted to current officers without violating the Constitution. The Attorney General concluded: "By virture of eligibility for membership in the State Employees' Retirement System the contemplated compensation of each officer mentioned in section 22 of Article V of the Constitution at the commencement of

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nued...

legislative body. (*Sweesy v. L.A., etc. Retirment Board,supra*, 17 Cal.2d at p. 361.) And it was indicated that once a particular measure of benefits has been granted it could still be taken away before the contingency which gave rise to the right to payment occurs. (Id. at p. 362.) In some respects the reasoning of these decisions has been undermined by subsequent developments in the law.

his current term was his salary plus a retirement allowance, not fixed and definite in its terms but subject to change from time to time. Accordingly, inclusion of such officers in the Legislator's Retirement System does not operate to increase their compensation during their terms of office in violation of the constitutional provision." (14 Ops.Cal. Atty.Gen 258 (1949).) However, limits were recognized. It was reasoned that officers had a right to a substantial and reasonable pension and "that changes in the pension system during the terms which do not increase or decrease the benefits beyond the limits of a substantial and reasonable pension do not operate either to increase or decrease the compensation during the term of office in violation of section 22 of Article V of the State Constitution." (Id. at p. 260.)

Since the enactment of the LRL in 1947, the Legislature has consistently acted pursuant to a retained power to adjust LRL benefits to maintain them at "substantial and reasonable" levels in light of changing circumstances. Legislative changes in the LRL which have been given immediate and sometimes retroactive effect include, but are not limited, to: extension of LRL benefits to elected officers (Stats. 1949, ch. 1570, sec. 1, p. 2808, amending sec. 9351); adjustment of age and service requirements for retirement (Stats. 1949, ch. 1570, sec. 6, p. 2809, amending sec. 9359; Stats. 1961, ch. 1897, sec. 1 & 3, pp. 4005-4007, amending sec. 9359 & 9359.16; Stats. 1971, ch. 1277, sec. 1, p. 2504, amending sec. 9359.16); granting credit for military service (Stats. 1951, ch. 384, sec. 3, p. 1184, amending sec. 9356.2); ex-

tending the period for electing to join the LRL, providing for open enrollment, and eventually permitting past legislators and officers to elect to join (Stats. 1951, ch. 1660, sec. 2, p. 3793, amending sec. 9355; Stats. 1959, ch. 597, sec. 3, p. 2575, amending sec. 9357.2; Stats. 1963, ch. 2026, sec. 1, pp. 4167-4168, amending sec. 9357.6); providing for "mixed" service as a legislator and as an officer (Stats. 1951, ch. 1660, sec. 5, pp. 3794-3795, amending sec. 9359.1); providing for and increasing death benefits (Stats. 1953, ch. 17, sec. 1, pp. 623-624, amending sec. 9359.8; Stats. 1957, ch. 1871, sec. 1, pp. 3275-3276, amending sec. 9359.8; Stats. 1959, ch. 2133, sec. 1, p. 5047, amending sec. 9359.8; Stats. 1963, ch. 1597, sec. 1, p. 3175, amending sec. 9359.8; Stats. 1971, ch. 1277, sec. 2, p. 2505, amending sec.

9359.8); increasing pension benefits (Stats. 1957, ch. 1212, sec. 1, pp. 2496-2497, amending 9359.1; Stats. 1959, ch. 766, sec. 1, pp. 2752-2753, amending sec. 9359.1; Stats. 1969, ch. 776, sec. 1, pp. 1553-1554, amending sec. 9359.1); providing for spousal and dependent benefits (Stats. 1957, ch. 1871, sec. 3, pp. 3276-3277, amending sec. 9361.1); providing for settlement options (Stats. 1961, ch. 1897, sec. 5, pp. 4007-4008 amending sec. 9360.7); providing for disability benefits (Stats. 1961, ch. 2123, sec. 1, pp. 4381-4382, amending sec. 9360.3); and providing for health and life insurance benefits (Stats. 1966, First Ex. Sess., ch. 152, sec. 1, p. 693, amending sec. 9359.83).

Perhaps the most significant adjustment in the LRL during this period was the addition of a provision for cost of

living adjustments based upon the Consumer Price Index. As we have recounted, in 1963 the Legislature, frustrated by the people's refusal to liberalize salaries, acted to increase LRL pension benefits. It provided for a cost of living adjustment of all LRL benefits based upon the 1954 calendar year, with annual adjustments every year thereafter. (Sec. 9360.9, Stats. 1963, ch. 2174, sec. 2, p. 4563.) This was the event which caused the pension benefits to which petitioners now claim entitlement to become inflated to extraordinary levels. At the time this legislation was enacted many of the pensioners who may be affected by Proposition 57, including petitioner Knight's decedent, former Governor Goodwin J. Knight, and petitioner Powers, a former Lieutenant Governor, had already left state service. Several other affected

parties, including petitioner Brown, a former Governor, had already commenced their last term of office. These parties accepted the benefits of the new cost of living adjustments, just as other recipients of LRL benefits have always accepted benefit increases, without regard to whether such increased benefits were granted after services were rendered or during a term of office. The only rational theory upon which these and other LRL benefit increases could lawfully be granted by the Legislature and accepted by an officer after a period of service has been completed or during a term of office is that LRL pension benefits are not absolutely fixed and certain but are subject to a residual power of legislative modification in light of changing economic circumstances.

In view of the history of the LRL

and in light of these constitutional and contractual principles, the contention of the petitioners is anomalous. On the one hand, the Legislature, PERS, and LRL recipients have treated LRL benefit levels as though they are not fixed and certain but are subject to legislative modification upward without conflicting with our constitutional provisions. On the other hand, when the Legislature seeks to curtail the excessive upward spiral of those benefits, the petitioners insist that their benefit formula is fixed and certain and cannot be modified regardless how absurd and excessive their benefit levels may become. The two positions are logically irreconcilable. In fact, the same residuum of authority which permits the Legislature to increase allowances to maintain them at substantial and reasonable levels must also

permit the Legislature to restrict future increases to prevent benefit levels from becoming excessive and unreasonable.

In reaching this conclusion we do not suggest that the level of retirement allowances which may be paid is wholly within the control of the Legislature. It is too late in the day to suggest that the Legislature has plenary control over pension allowances. However, where a particular formula for the calculation of allowances has combined with other factors to increase allowances to unreasonable levels, then the same power which permits the Legislature to adjust the formula to keep benefits from becoming less than substantial and reasonable must also permit the Legislature to adjust the formula to keep benefits from becoming unconscionable and extravagant.

This conclusion is supported by

fundamental rules of interpretation. First, we are constrained to interpret a statutory scheme so as to avoid conflict with the Constitution. (*Cemetery Board of California v. Telophase Society of America* (1978) 87 Cal.App.3d 847, 857; *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 726.) If we accepted petitioners' claim that their benefit formula is absolutely fixed and certain and wholly immune from legislative modification, then we would necessarily cast doubt upon the traditional retroactive modification of that formula for increased benefits after retirement or during a term of office. Second, we must give great weight to an interpretation of a statutory scheme by those charged with implementing it. (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 647-648.) The Legislature

and PERS have traditionally treated the LRL as though there is some residuum of legislative power to modify its provisions, at least since PERS sought and obtained an opinion from the Attorney General construing the LRL in such a manner. Finally, as a matter of contract law, we must consider the actions of the parties to a contract in determining its meaning. (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.) The Legislature has always felt free to increase LRL allowances retroactively or during an officer's current term of office, and recipients of LRL benefits have always felt free to accept additional benefits. In this instance, actions speak louder than words. By their conduct the Legislature and LRL recipients have jointly recognized a residual legislative power to modify pension benefits,

at least in the face of compelling circumstances related to the purpose and appropriate operation of the law.

In searching the decisional law we do not find persausive authority contrary to this conclusion. In most of the decisions the legislative body attempted to reduce or even eliminate pension benefits in circumstances where the prior benefit levels could in no way be suggested to be excessive or unreasonable and for reasons which bore no relation to the theory and appropriate operation of a pension system. For example, in *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, the employee had worked for nearly 20 years with a pension law in effect and shortly before he was to retire the city attempted to repeal the law and deprive him of any pension. In *Terry v. City of Berkeley, supra*, 41 Cal.2d 693, the

employee had worked and retired on disability at a time when the pension law provided for a pension of one-half of current salary levels. The city attempted to amend the law retroactively to establish the pension at one-half of the employee's former pay without any other cost of living adjustment. Similarly in *Allen v. City of Long Beach, supra*, 45 Cal.2d 128, the city's pension law had attempted to reflect inflationary decreases in purchasing power by providing for pensions of one-half of current salaries and the city subsequently attempted to reduce pensions to one-half of the pensioner's former salary. In rejecting the attempt to do so the Supreme Court noted that the city had offered no justification for the reduction which was related to the functioning and integrity of the pension system. (Id. at p. 133.)

In *Wallace v. City of Fresno, supra*, 42 Cal.2d 180, the city sought to deprive an employee of all pension benefits because he had been convicted of filing a fraudulent tax return, although the city's pension law did not provide for such a forfeiture. In rejecting the city's attempt, the Supreme Court held that the reasons offered by the city did not have any material relation to the theory of the pension system or its successful operation. (Id. at p. 185.)

Two reported decisions, *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774, and *Allen v. Board of Administration, supra*, 34 Cal.3d 114, did concern attempts to restrict spiralling pension increases based upon double cost of living adjustments. Both of these decisions involved the LRL and arose in part as a result of the 1963 provision for annual cost of

living adjustments. We have previously noted that cost of living adjustments based on the Consumer Price Index were added to the LRL effective in 1964 after a period of stasis with respect to legislative salary levels. Subsequently, in the November 1966 General Election the voters ratified a partial revision of the state Constitution. Legislative salaries were increased from $6,000 to $16,000 per year and the voters conferred upon the Legislature the power to raise salary levels by up to five percent per year. (Cal. Const., art. IV, sec. 4. See also sec. 8901.) In doing so, however, the people by constitutional provision and the Legislature by statute provided that legislative reitrement benefits could not be based upon a monthly salary in excess of $500 per month unless the recipient had received a greater amount while

serving in the Legislature. (Cal. Const., art. IV, sec. 4. See sec 9359.11.)

In *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774, a widow of a retired legislator sought a writ of mandate to compel the State Controller and PERS to calculate her benefits based upon current legislative salaries rather than upon the $500 per month limitation on the ground that the limitation violated the contract clause of the federal Constitution. This court rejected the claim. We said (with citations omitted): "The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that acts be enforced according to their 'just and reasonable purport;' not only is the existing law read into contracts in order to fix their obligations, but the reser-

vation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (271 Cal.App.2d at p. 782.) We also found that California retirement decisions recognized a residuum of continuing governmental power to adopt limited changes. (Ibid.)

In considering the validity of the

1966 limitation on LRL benefits, we noted that the original purpose for tying benefit levels to current salaries was to maintain the real purchasing power of the beneficiaries' allowances. That original fluctuation formula had been dormant due to the failure of the voters to raise salary levels and, although it was not required to do so, commencing in 1964 the Legislature fulfilled that purpose by providing for cost of living increases based upon the Consumer Price Index. As a result the subsequent liberalization of legislative salaries had no relevancy to the retirement law's cost of living objective since that objective was then being met through the alternate formula. (*Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 785.) We also noted that at that time the application of the original formula would raise questions of funda-

mental fairness as well as financial prudence. To base retirement benefits on the new legislative salary levels would "hand them a bonanza far outstripping their expectations for cost-of-living increases, dwarfing their relatively modest contributions and demanding enlarged appropriations of general tax funds to maintain the retirement system's solvency." (Id. at 786.) The withdrawal of the fluctuation formula was an exercise of governmental power that was reasonably adapted to the public interest, supportive of a sound pensions system, and not aimed at an arbitrarily selected class. (Ibid.) We concluded: "The 1966 restriction preserved the basic character of the earned benefit but withheld a windfall unrelated to its real character. In juxtaposition to the legitimate exercise of ongoing governmen-

tal powers, the beneficiaries' rights were measured not by 'rigid literal fulfillment' of the contract, but by its 'just and reasonable purport.' The law-making power chose to confine beneficiaries to the gains 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision. Such a choice is not the repudiation of a debt, not an impairment of the contract." (Id. at p. 787, citation omitted.)

In *Allen v. Board of Administration, supra*, 34 Cal.3d 114, retired members of the Legislature again attacked the 1966 limitation on contract clause grounds. The plaintiffs sought to distinquish the decision in Lyon in two respects. First, it was asserted that in Lyon the widow's husband had retired from the Legislature

before 1963 and thus had not actually served while there were two cost of living formulae in effect, while the Allen plaintiffs had served during the period both laws were effective. Second, it was asserted that the holding in Lyon was weakened or discredited by the subsequent decision in *Betts v. Board of Administration, supra,* 21 Cal.3d 859. We will discuss the decision in Betts more fully in a subsequent portion of this opinion. For now it is sufficient to note that the Allen court found neither basis for distinquishing Lyon persuasive and adhered to our holding in Lyon.

We find the situation here to be, in all important respects, identical to the situation in Lyon and Allen. Here, as in Lyon and Allen, the Legislature was contemplating a fundamental restructuring

of the manner in which incumbents are compensated. In Lyon and Allen this change was to be in the form of an immediate and substantial pay increase and a delegation of authority to the Legislature to grant annual pay raises up to five percent. Here the restructuring was in the form of an immediate and substantial pay raise with provision for automatic future cost of living adjustments based upon pay raises granted to state employees. Here, as in Lyon and Allen, the immediate increases in salaries and the future automatic salary cost of living adjustments have no relevancy to the retirement law's cost of living objective since that objective is being met through the alternate formula. To base retirement benefits on the new salary levels would raise questions of fundamental fairness as well as financial

prudence. In the words of the Lyon court, it would "hand them a bonanza far outstripping their expectations for cost-of-living increases, dwarfing their relatively modest contributions and demanding enlarged appropriations of general tax funds to maintain the retirement system's solvency." (271 Cal.App.2d at b. 786.)

In Proposition 57 the Legislature and the people did not attempt to reduce future allowances from the already high levels to which they had grown. Instead Proposition 57 preserves petitioners' rights to these inflated allowance levels and guarantees them that they will continue to receive annual adjustments based upon the Consumer Price Index. What Proposition 57 denies to petitioners and other affected parties is an unforeseen windfall advantage which has no relation

to the real theory and objective of a retirement system. Under the circumstances presented we find this to be an appropriate situation for the exercise of the residuum of legislative control over the LRL and consequently we find Proposition 57 to have been an appropriate response to the circumstances. Thus, even assuming that petitioners obtained vested contractual rights in the LRL, those rights were not impaired by the enactment of Proposition 57 in these extraordinary circumstances of unforeseen windfall benefits.

C.

Comparable New Advantages.

Finally, we consider the doctrine of comparable new advantages. Obviously, the doctrine is not involved where the claim involves a noncontractual public pension system since legislative modifi-

cation of such a system does not implicate the contract clause. We turn therefore to contractually vested systems.

Contrary to petitioners' assertion, our law has never considered pension benefits to be absolutely immutable, even when there is manifested a clear intent to make them contractual in nature. "Not every change in a retirement law constitutes an impairment of the obligations of contracts, however. Nor does every impairment run afoul of the contract clause." (*Allen v. Board of ADministration, supra*, 34 Cal.3d at p. 119, citation omitted.) Thus, the high court explained in *Kern v. City of Long Beach, supra*, 29 Cal.2d at pages 854 and 855: "The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing

conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." Similar expressions may be seen in *Abbott v. City of Los Angeles*, (1958) 50 Cal.2d 438 at pages 447-448; *Allen v. City of Long Beach, supra*, 45 Cal.2d at page 131; and *Packer v. Board of Retirement* (1950) 35 Cal.2d 212 at page 214.[12]

In *Allen v. City of Long Beach, supra*, 45 Cal.2d at page 131, the court set forth the standards for judging the validity of pension modifications: "Such modifications must be reasonable, and it

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12. There is language in some of the cases which suggests a distinction between modifications made before the employee retires and those that are made after retirement. However, in *Kern v. City of Long Beach, supra*, 29 Cal.2d at page 855, the Court said, "Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due." (Emphasis in original. See also *Allen v. Board of Administration, supra*, 34 Cal.3d at p. 124.)

is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."

Immediately prior to the November 1986 General Election the petitioners' basic pension benefits had risen to extraordinary levels, far exceeding the benefits available under any other governmental pension plan in the state. By Proposition 57 the Legislature and the people sought to preserve those benefits at the already high existing levels, with annual cost of living adjustments based upon the Consumer Price Index. They also

sought to preserve those benefits at the already high existing levels, with annual cost of living adjustments based upon the Consumer Price Index. They also sought to preclude allowances from further skyrocketing based upon factors which have no relevance to inflationary decreases in the purchasing power of petitioners' allowances, since that factor is met through other means. In short, they sought to prohibit "windfalls and unforeseen advantages which have no relation to the real theory and objective of a sound retirement system." (Cal.Const., art. III, sec. 7, subd. (c).) Such a goal obviously bears a material relation to the theory of a pension system and its successful operation. This is particularly true where, as here, the benefits petitioners claim dwarf their modest contributions to the system and require

increasing annual appropriations from general tax revenues for payment.[13] As we said in *Lyon v. Flournoy, supra*, 271 Cal.App.2d at page 786, such a situation raises questions of fundamental fairness as well as financial prudence. As the Court noted in *Allen v. Board of Administration, supra*, 34 Cal.3d at page 125, every principle of equity and financial responsibility stongly counsels against

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13. During the period petitioners claim to have accrued their extraordinary pension rights they made modest contributions to the fund and the state made no contributions on their behalf. Petitioners contributions were obviously long ago dissipated by the extraordinary benefits they received. Petitioners seem to believe that their benefits can be paid from the state's contributions on behalf of current officers. They are wrong. Since 1978 the state has made contributions to the fund on behalf of current officers. The soundness of the system is achieved through this reserve funding and the restriction upon benefit levels which may be earned. The reserve funding paid on behalf of members since 1978 is part of the contractual rights of those members and it cannot be used for other purposes, such as the payment of benefits to petitioners. (*Valdes v. Cory* (1983) 139 Cal.App.3d at pp. 786-787.)

such a consequence.

Although modifiable under appropriate circumstances, a contractually vested public pension system which is substantial and reasonable cannot be diminished without a comparable new advantage. Thus, "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Allen v. City of Long Beach, supra*, 45 Cal. 2d at p. 131.) And it "has been said that the offsetting improvement must also 'relate generally to the benefit that has been diminished.'" (*Betts v. Board of Administration, supra*, 21 Cal.3d at pp. 864-865.) Petitioners assert, of course, that Proposition 57 represents a change to their disadvantage without comparable new advantages. If the LRL had been a vested system and had the benefits been

reasonable rather than absurdly extravagant, we would be inclined to agree. But since LRL possessed neither characteristic, we disagree. In a previous portion of this opinion we have discussed the effect of the provision, unique to the LRL, by which the Legislature expressly refused to provide a continuing appropriation for the payment of benefits. The effect of the legislative language, which we are not at liberty to ignore, was to preclude the acquisition of express or implied contractual rights against the state. Moreover, since the power of appropriation is a peculiarly legislative function, the courts have no power to compel the Legislature to make an appropriation for the payment of petitioners' benefits. (*Baggett v. Dunn* (1886) 69 Cal.75, 77; *Myers v. English, supra*, 9 Cal. at p. 349.)

In Proposition 57 the Legislature and the people created, for the first time, an enforceable right to appropriation for payment of the benefits under the LRL as it existed during the time petitioners claim to have obtained their right to payment of their extraordinary benefits. The act of placing the provisions of Proposition 57 in the state Constitution obviates any defense against payment based upon the lack of an appropriation, the lack of a contractual right, or other legal theories. The constitutional provision must be construed as an appropriation for payment of the benefits it affirms in the petitioners. (*Baggett v. Dunn, supra*, 69 Cal. at p. 77.) We cannot discount the value of this newly granted right of enforcement. As the United States Supreme Court has said: "Nothing can be more material to

the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual." (*United States v. Quincy* (1866) 71 U.S. (4 Wall.) 535, 552 [18 L.Ed. 403, 409]; see also *Home Building & Loan Asso. v. Blaisdell, supra*, 290 U.S. at p. 430 [78 L.Ed. at p. 424].) By enacting an enforceable appropriation for the payment of benefits with annual cost of living adjustments, Proposition 57 grants a comparable new advantage to offset the limitation upon petitioners' hopes for allowances which would continue to skyrocket above any reasonable measure for cost of living adjustments.

D.

Summary of the Contract Clause Discussion.

We have considered the LRL and Proposition 57 from three perspectives. First, we have considered the effect of the Legislature's express refusal to provide a continuing appropriation for the payment of LRL benefits. Under fundamental legal principles, the lack of an appropriation precluded petitioners from obtaining contractual rights to the payment of specific benefits. Thus, the Legislature retained control over the payment of such benefits which was properly exercised in Proposition 57 without a violation of the contract clause of the federal Constitution. Second, under applicable legal principles and the long-term treatment of the LRL by the Legislature, PERS, and the parties, there must be held to be a residuum of legislative control over the LRL in order to modify

allowance formulae to withhold windfalls and yet at the same time to fulfill its provisions according to their just and reasonable import. Proposition 57 was a proper exercise of that retained control. Finally, under the so-called Allen criteria, we find that Proposition 57 bears a material relation to the theory of a pension system and its successful operation and vests petitioners with comparable new advantages to offset disadvantages. Under each of these perspectives, Proposition is not invalid on its face.

II

The Betts Decision.

In 1978 the Supreme Court decided a case in favor of former State Treasurer Bert Betts. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859.) Betts had been Treasurer from 1959 to 1967. When he entered office, and at the time of his

reelection, the LRL had provided for retirement allowances based upon the salary of the incumbent. During his last term of office the Legislature added section 9360.9 to the LRL to provide for the adjustment of all LRL allowances payable after January 1, 1964, to account for changes in the cost of living since 1954, as measured by the Consumer Price Index. Betts left office in 1967 but did not immediately meet the age or disability requirements for "retiring" in the sense of drawing benefits. In 1969, effective with the term commencing in 1971, the Treasurer's salary was raised to $35,000 per year, the level at which it remained at the time of the Betts decision in 1978. In 1974 the Legislature amended section 9359.1 to provide that retirement benefits were to be measured by the highest salary the offi-

cer received while in office. The amendment was expressly made inapplicable to officers who had "retired" on its effective date. Betts applied for benefits in 1976 and, when the Board refused to calculate his benefits on the basis of the Treasurer's current salary, he sought a writ of mandate. The Supreme Court concluded that under the circumstances presented Bett's allowance should be computed on the basis of the $35,000 salary then being paid the incumbent Treasurer. (21 Cal.3d at p. 865.)

Petitioners assert that principles of res judicata, collateral estoppel, and stare decisis compel that the decision in Betts be deemed controlling here. If Betts is to have determinative effect, it must be through the doctrine of stare decisis. "Res judicata and collateral estoppel give conclusive effect to a

former judgment in subsequent litigation involving the same controversy. In a new action on the same cause of action a prior judgment for the defendant acts as a complete bar to further litigation, and a prior judgment for the plaintiff precludes litigation because it results in a merger, superseding plaintiff's claim by a right of action on the judgment. In a new action on a different cause, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, being conclusive on issues actually litigated in the former action. The doctrines of res judicata and collateral estoppel are based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. The purposes of the doctrines are to promote judicial economy

by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, and to provide repose by preventing a person from being harassed by vexatious litigation. In determining whether the doctrines are applicable a court must balance the need to limit litigation against the right to a fair adversary proceeding in which a party may fully present his case." (*Jackson v. City of Sacramento* (1981) 117 Cal.App.3d 596, 601, citations and paragraphing deleted. See also *Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.)

At their essence, res judicata and collateral estoppel are doctrines of issue preclusion. Where applicable res judicata and collateral estoppel do not guide a court's consideration of the issues presented; rather, they preclude

the court from considering and adjudicating those issues anew. In short, if we agreed with petitioners that res judicata and/or collateral estoppel were applicable, we would be precluded from considering any justification of support for Proposition 57 which might be offered. Such a preclusive affect is not appropriate, or even legally arguable, here. Res Judicata applies only when the second case involves the same cause of action between the same parties or their privies as did the first case. (*Jackson v. City of Sacramento, supra*, 117 Cal.App.3d at p. 601.) Collateral estoppel applies only where the same parties or their privies actually litigated and finally determined an identical factual issue in prior litigation. (Ibid.) Generally these doctrines do not apply to legal questions as opposed to factual ques-

tions, and this is particularly true with respect to cases which concern matters of important public interest. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 872; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230.)

In Betts, one former constitutional officer asserted that a statutory amendment to the LRL enacted after he left office but before he began to draw benefits should not be applied to him. At issue in this case is the validity of the constitutional amendment enacted by Proposition 57. This is a legal question of important public concern that was neither at issue nor actually determined in Betts, and we find the doctrines of res judicata and collateral estoppel inapplicable.

Our conclusion that we are not precluded from considering the validity

of Proposition 57 does not mean that the Betts decision has no effect. To the contrary, the Betts decision may have precedential value through the doctrine of stare decisis. Under the strictures of stare decisis we are required to follow the ratio decidendi of decisions of our Supreme Court. (9 Witkin, Cal. Procedure (3d Ed. 1985) Appeal, sec. 783, pp. 753-755.) The ratio decidendi is said to be the principle or rule which constitutes the ground of the decision and thus has the effect of a precedent. (Ibid.) On the other hand, dicta, that is, general observations, statements, or arguments which do not form the necessary basis for the decision, may be persuasive but are not binding precedents. (Ibid.; *Ng. v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 606.) The language used in any opinion must be understood in

light of the facts and issues then before the court because an opinion is not authority for a proposition not considered. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) As the high court most recently said, "[i]t is axiomatic, of course, that a decision does not stand for a proposition not considered by the court." (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.) Sometimes the language used in an opinion must be distinguished from its holding (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 668.) This is because the result in a decision is not authority for a contention which was not presented and resolved. (*General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 114; *Meehan v. Hopps* (1955) 45 Cal.2d 213, 217-218.) And, of course, a decision will not be binding upon a later case involving

materially different circumstances.

We find many distinctions between the Betts situation and the circumstances of this case. Betts had completed his tenure as Treasurer in 1967. In 1971 the Legislature provided that benefits for officers first elected after January 1, 1972, were to be calculated upon the basis of the highest salary the officer received while in office. (Sec. 9359.13, Stats. 1971, ch. 1277, sec. 4, p. 2505.) In 1974 the Legislature amended section 9359.1 to provide that benefits were to be based upon the highest salary received by the officer while in office. (Stats. 1974, Second Ex. Sess., ch. 1, sec. 5, pp. 3953-3955.) The amendment was expressly made inapplicable to members who were retired on its effective date. (*Ibid.*) The enactment was given immediate effect as an urgency measure with the

stated urgency being so that its provisions would apply to members who left office in 1974. (Stats. 1974, Second Ex. Sess., ch. 1, sec. 10, p. 3957.)

Under these circumstances it was not even clear that the amendment was intended to apply to someone like Betts, who had left office in 1967. The board sought to apply it to him because he had not actually begun drawing benefits, although he had left office before 1974. Moreover, the board sought to apply the modification to Betts in a manner which would not merely freeze his benefit base at a level to which it had already risen, but which would roll back his benefit base to the level it had been several years before the effective date of the modification.

The application of the law to Betts in this manner created insurmountable

legal problems. The courts of this state have long held that modifications of a pension law must be reasonable in nature and have a material relation to the theory of a pension system and its successful operation. (*Allen v. City of Long Beach, supra*, 45 Cal.2d at p. 131.) Thus, as the Allen court explained it, "[t]he primary basis for our determination that Betts reasonably was entitled to expect the benefit of both the fluctuating and cost-of-living provisions was the absence in his case of any factors militating against the reasonableness of that expectation such as were present in Lyon and are present here." (*Allen v. Board of Administration, supra*, 34 Cal.3d at p. 123.) By "focusing on 'reasonable pension expectations' in Betts (italics added), we implicitly affirmed the well established constitutional principle that

'Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.'" (Id. at p. 124.) Moreover, fundamental fairness and financial prudence are important considerations. (Id. at p. 125; *Sweesy v. L.A. etc. Retirement Bd., supra*, 17 Cal.2d at p. 362; *Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 786.) And a modification cannot single out some members for disparate treatment based upon factors which do not have an important connection to the purpose and operation of the pension law. (*Allen v. City of Long Beach, supra*, 45 Cal.2d at p. 133; *Wallace v. City of Fresno, supra*, 42 Cal.2d at p. 185; *Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 786.)

Under the circumstances the attempt

to apply the 1974 amendment to Betts was doomed to failure. Betts found himself being singled out for disparate treatment based upon the date he applied to receive benefits rather than upon factors having some reasonable relation to the purpose of the law or the 1974 modification. In short, persons who had served before, after, or at the same time as Betts would not be denied the fluctuating aspect of their benefit calculation if they had begun to draw benefits before the effective date of the 1974 modification. Betts, on the other hand, was not only to be denied future increases based upon salary increases of the incumbent, he was to be rolled back to an earlier salary level for determination of his benefits. Regardless whether a particular statutory scheme may be said to create a contractual relationship, fundamental legal prin-

ciples preclude the state from modifying or repealing benefits of the law unless the new legislation serves an important state interest and does not operate in an arbitrary and unequal manner. (*Hayes v. Wood* (1979) 25 Cal.3d 772, 786-787; *Gawzner Corp. v. Minier* (1975) 46 Cal.App.3d 777, 784; *Russell v. Carleson* (1973) 36 Cal.App.3d 334, 343 [equal protection]. See also *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1007-1008; *Flournoy v. State of California* (1964) 230 Cal.App.2d 520, 536-537 [due process].)

Given this background, and the manner in which the 1974 legislation would operate, there was very little the Board of Administration could offer as a justification for application of the amendment to Betts. The 1974 legisla-

tion, unlike Proposition 57, did not grant Betts an enforceable appropriation for the payment of his benefits in exchange for a reasonable limitation upon their potential growth. In fact, the effect of the Legislature's express refusal to provide a continuing appropriation in support of the LRL at the time of its enactment was not addressed at all. The legal history of the LRL was not considered to determine whether, pursuant to the LRL, the Legislature retained some modicum of authority to modify its terms. And it was not asserted that application of the modification to Betts was necessary to preclude him from receiving an extraordinary windfall unrelated to the real theory and objective of a pension system. In fact, at that time changes in the Consumer Price Index had not combined with increases in

the salaries of constitutional officers to cause pension allowance to skyrocket to levels which could clearly be termed "windfalls." As a result, the Board of Administration argued only that the 1963 amendments to the LRL, which provided for annual cost of living adjustments, would serve as an offsetting advantage for the 1974 legislation. (*Betts v. Board of Administration, supra*, 21 Cal.3d at p. 865.) The court found that the contention could not be sustained under the circumstances presented. (Ibid.)

Unlike the 1974 legislation, Proposition 57 does not permit some former constitutional officers to retain extraordinary benefits while restricting others, Rather, it is an across-the-board measure aimed at breaking the linkage with future salary increases. It does not attempt to roll back pension

allowances from the extraordinary levels they have reached; it merely freezes the salary levels upon which benefits are to be calculated so that benefits will not continue to skyrocket beyond actual increases in the cost of living. At this time the benefit levels which retired officers receive fully warrant the application of such terms as "windfall," "bonanza," and "unforeseen advantages" which have no relation to the real theory and objective of a cost of living provision. At this time petitioners' benefit levels truly may be said to dwarf their modest contributions to the fund and require correspondingly excessive appropriations of general tax funds for their payment. These are considerations which were important in Lyons and Allen but were not mentioned in Betts.

A significant distinction between

the legislation involved in Betts and Proposition 57 is that, like the legislation in Lyon and Allen, Proposition 57 was enacted in anticipation of a substantial alteration of the manner in which the compensation of constitutional officers is determined. Before the terms which were to begin after the November 1986 election, the salaries of constitutional officers were set by statute. Every increase in salary required the Legislature to affirmatively enact an incremental statute before the commencement of the term. The result was long periods of salary stasis between relatively modest raises. For example, in Betts it was noted that the Treasurer's salary was raised to $35,000 per year in 1969, which would have actually commenced with the term beginning in 1971. It was eight more years, to the term beginning

in 1979, before another raise was granted, this time to $42,500. (Sec. 11552.5, Stats. 1977, ch. 1099, sec. 1, p. 3516.) Eight more years would pass, to the term commencing in 1987, before another raise was granted (Sec. 11552.5, Stats. 1983, ch. 803, sec. 11, pp. 2935-2936.) This is fairly typical of the history of salary raises for constitutional officers.

In 1963, when the Legislature enacted the Consumer Price cost of living provisions, the voters had denied the Legislature a pay raise for nine years, which caused the courts in *Lyon* (271 Cal.App.2d at p. 785) and *Allen* (34 Cal.3d at p. 124) to conclude that as to members and former members of the Legislature the fluctuating benefit formula was dormant. With respect to constitutional officers the fluctuaing formula

may not have been completely dormant, but was certainly not thriving or doing a reasonable job in providing financial security against the creeping progression of cost indices.

Commencing with the terms to begin after the November 1986 elections, the Legislature determined to overhaul completely the system for compensation of elected constitutional officers. All constitutional officers were to be granted substantial and immediate cost of living increases. The Governor received a 73.12 percent raise. The Attorney General received a 63.15 percent raise. The Lieutenant Governor, Controller, Secretary of State, Treasurer, and the Superintendent of Public Instruction received raises of 70.59 percent. And the members of the Board of Equalization

received raises of 78.95 percent.[14] In addition to these substantial and immediate pay raises, the Legislature acted to provide for automatic future pay raises based upon the pay raises granted to state employees. For the Board of Equalization these adjustments occur annually and for all other officers they occur at the commencement of each new term. Thus, the Legislature has provided for immediate and substantial "catch-up" raises for constitutional officers with automatic cost of living increases thereafter in

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14. The pay raises for the members of the Board of Equalization went into effect before the November 1986 election since they may receive raises during a term of office. For this reason the substantial pay raises granted the Board of Equalization during this legislative overhaul of the compensation system were used in determining retirement allowances of former members of the Board of Equalization or their dependents. This, combined with relatively long tenure for such persons, is why the retirement allowances of former members of the Board of Equalization or their dependents are even more extraordinary than those of other retired officers.

order to end the historical static underpayment of those officers.

The purpose of adjustments to pension allowances, whether through a fluctuating formula or some other means, is to enable retired employees to maintain a fairly constant standard of living despite fluctuations in living costs. (*Lyon v. Flournoy, supra*, 271 Cal.App.2d at p. 783.) With respect to petitioners' pension allowances, the sharp salary increases to take effect after the November 1986 election and the periodic automatic adjustments thereafter have no possible relevancy to the cost of living objective of a sound pension system. For petitioners that objective is amply, and in most cases more than amply, met by the Consumer Price Index adjustments under section 9360.9 or 9360.10. Nor were these large catch-up salary increases and

automatic cost of living adjustments something which petitioners could have reasonably expected at the time they served in office since that was not the way officers were either actually compensated at that time or had been so compensated historically. In fact, the failure of the fluctuating formula to provide an adequate hedge against inflation was the reason the Legislature enacted the Consumer Price Index provisions to serve that function.

In Lyon and Allen the legislation which precluded pension allowances from being calculated on the basis of current legislative salaries was enacted in anticipation of a major overhaul in the manner in which legislative salaries were determined. That factor was also a major reason for Proposition 57. It was entirely lacking in Betts, and this was an

essential and critical factor in the Betts decision. (*Allen v. Board of Administration, supra*, 34 Cal.3d at pp. 124-125.) This, as well as the other factors we have mentioned, serves to distinguish the legal ramifications of Proposition 57 from the legislation involved in Betts.

In light of these reflections, we find that the decision in Betts does not compel the conclusion that Proposition 57 is unconstitutional. Our reasons for this conclusion may be summarized this way. First, the statutory amendment involved in Betts was not enacted in anticipation of a major revision in the manner for determining the compensation of constitutional officers as was Proposition 57. Second, at the operative time in Betts the combination of changes in the Consumer Price Index and salary

increases for state officers had not combined to increase pension allowances to extraordinary levels out of proportion to the real theory and objective of a pension plan and which could only be described by the use of such words as "bonanza" and "windfall," requiring correspondingly excessive appropriations from general tax funds for payment. Third, the application of the 1974 legislation to Betts would not only have broken the salary-pension linkage with respect to future salary increases, it sought to roll back the basis for his pension calculation to a salary level which existed serveral years before the amendment. Finally, the 1974 legislation did not apply to officers who were "retired" on its effective date and thus its application to Betts was arbitrary in that it singled him out for disparate

treatment on the basis of the date he began to receive benefits, an irrelevant factor for the purposes of the pension law and the modification. In view of the obvious legal difficulties in the application of the 1974 legislation to Betts, the board offered only one potential justification for its application, that the 1963 cost of living provision could serve as a "comparable new advantage" in exchange for the detriment caused. As a result, the court did not discuss or consider whether Betts could have obtained a contractual right to a fixed and unmodifiable formula for the calculation of benefits in view of the Legislature's express refusal to enact a continuing appropriation for the payment of benefits pursuant to such a formula. Moreover, since the 1974 legislation did not provide an enforceable appropriation to guarantee

future payments, the court did not consider whether such an appropriation could serve as a comparable new advantage in exchange for the limitation upon the future growth of benefit levels. Accordingly, the Supreme Court's rejection of the single tendered justification for the application of the 1974 legislation to Betts does not compel the conclusion that Proposition 57 is an unconstitutional infringement of contract rights.

III

Application to Mixed Members.

Having rejected the constitutional challenge to Proposition 57, we turn next to the contention of petitioners Flournoy and Powers that the proposition does not apply to them. Petitioners' contention is based upon the language utilized in the first part of subdivision (a) of section 7 of article III of the state

Constitution, which reads: "The retirement allowance for any person, all of whose credited service in the Legislators' Retirement System was rendered or was deemed to have been rendered as an elective officer of the state . . ." Petitioners assert that this language excludes them because they served as members of the Legislature as well as constitutional officers.

In considering the effect of a statutory enactment by the Legislature or a provision adopted by the voters, our first reference must be to the language utilized. If the language is clear and unambigous then there is no need to resort to indicia of the intent of the Legislature or of the voters and a court should disregard such matters. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *In re Lance W.* (1985) 37 Cal.3d 873,

886.) However, the indicia of intent which must be disregarded in the initial stages of construction are matters which are extrinsic to the provision under consideration. In considering the meaning of a measure we must consider the measure in its entirety; we may not focus upon isolated words or phrases. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735; *ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 867.) Where the intent of the Legislature and/or the voters can be determined from the measure as a whole then that intent must be given effect even if that means disregarding the literal language of measure. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735; *People v. Skinner* (1985) 39 Cal.3d 765, 775; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

The rules of construction applicable here have been summarized by the Supreme Court in *Lungren v. Deukmejian, supra*, 45 Cal.3d 727 at page 735, quoted here with citations omitted: "But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the

spirit of the act. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. These rules apply as well to the interpretation of constitutional provisions."

In support of their claim petitioners point to section 9359.1, subdivisions (b) and (c). Subdivision (b) provides the basic formula level for retired officers. Subdivision (c) provides a similar formula for retirees with mixed legislative and constitutional officer service. As we have previously noted, by enacting subdivision (c) the Legislature avoided the confusion which would result from attempting to calculate a pension allow-

ance based upon multiple formulae, and avoided the possibility that a member would forfeit a particular benefit level by going to the Legislature from a constitutional office or vice versa. Accordingly, benefits under subdivision (c) are calculated on the basis of the highest salaried office the retiree held, and if higher benefits could be obtained as a former legislator under subdivision (a) or as a former officer under subdivision (b), then all service is deemed to have been as a legislator or officer in order to entitle the retiree to the higher pension allowance.

The pension benefits for both petitioners are in fact identical under section 9359.1, subdivision (b) and subdivision (c). Both petitioner Flournoy and petitioner Powers have sufficient service to qualify for the eight

year/forty percent benefit level. Both have their pensions calculated on the basis of the salary of the constitutional office they last held. The pension allowance of each petitioner is adjusted for changes in the cost of living since 1954 under section 9360.9. As a result they would receive the same pension allowance regardless whether it is calculated under subdivision (b) or subdivision (c). According to petitioners this has two results. First, pursuant to subdivision (c), all of their service is not "deemed to have been rendered . . . as an elective officer," under subdivision (b), since to do so would result in the same but not greater benefits. Second, petitioners believe that section 9359.1, subdivision (c) provides them with an escape hatch by which they may avoid the effect of Proposition 57 since

calculation of their benefits under the officer formula as restricted by Proposition 57 would result in lesser benefits than those payable under subdivision (c) without such a restriction.

To the extent that petitioners' argument implies that section 9359.1 must be regarded as controlling over Proposition 57, we reject it. The voters placed the provisions of Proposition 57 in our state Constitution. As a part of our Constitution those provisions are the highest expression of the will of the people acting in their sovereign capacity as to matters of state law and they must be given effect as the supreme law of the state. (*Playboy Enterprises, Inc. v. Superior Court, supra*, 154 Cal.App.3d at p. 28; *Pooled Money Investment Bd. v. Unruh, supra*, 153 Cal.App. 3d at p. 160.) Our task is to determine the intent of

Proposition 57 and to give effect to that intent. If Proposition 57 should conflict with statutory provisions then it is Proposition 57 which is controlling.

While section 9359.1 cannot be regarded as controlling over Proposition 57, this does not mean that it is irrelevant. Proposition 57 was intended to serve as a constitutional correction to an aspect of a statutory scheme which the Legislature and the voters regarded as unfair, even pernicious. Proposition 57 must be read in light of the statutory scheme it was intended to correct. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735; *In re Catalano* (1981) 29 Cal.3d 1, 10-11.) The similarity of language in section 9359.1, subdivision (c), and in the first sentence of Proposition 57, does not provide arguable support for the claim that the use of

such language was intended to exclude persons such as Flournoy and Powers from the effect of Proposition 57. However, in determining the meaning and effect of Proposition 57, we cannot rely solely upon such a similarity in language. Our first reference must be to the particular terms of Proposition 57. In considering the terms of Proposition 57 we cannot focus upon isolated words or phrases but must consider all of Proposition 57 in context.(*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.)

In considering the opening sentence of Proposition 57, we find petitioners' suggested interpretation to be a plausible, but not the only permissible, interpretation of the language utilized. In determining the meaning of a statutory or constitutional provision the words used should be given the meaning they bear in

ordinary usage. (*Lungren v. Deukmejian, supra*, 45 Cal. 3d at p. 735.) Under most governmental retirement systems the concept of credited service refers to the years of service which are used in calculating a retiree's pension allowance. (See for example sec. 20800 et seq., sec. 21250 et seq. [PERS]; sec. 31640 et seq., sec. 31662 et seq. sec. 31670 et seq. [county employees]; Ed. Code, sec. 22700 et seq., sec. 24000 et seq. [teachers].) In accordance with this usage it would appear that the reference to "credited service" in Proposition 57 refers to the years of service which are actually used in the allowance computation for retired officers.

Petitioner Flournoy served as State Controller for eight years. His retirement allowance under the LRL is based upon eight years of service and is calcu-

lated with reference to the salary of the State Controller. In this calculation both his service in the Legislature and his legislative salary are completely disregarded. Proposition 57 was aimed at retired LRL members who stood to obtain windfall pension increases due to service as a constitutional officer. Since the amount of Flournoy's pension is based entirely upon his service as an officer and he stood to gain windfall pension increases based upon such service, it would appear that Proposition 57 was intended to apply to him. In our view it is consistent with Proposition 57 to conclude that its application depends upon the service upon which an officer's pension is actually calculated rather than upon some other form of service which is disregarded in determining his pension allowance.

Petitioner Powers served as Lieutenant Governor for less than eight years. He was permitted, however, to tack some of his prior legislative service to his service as an officer in order to obtain pension benefits based upon eight years of service. His pension allowance is calculated on the basis of the salary of the Lieutenant Governor. In this calculation his legislative salary and all of his legislative service, other than that which is tacked to his service as an officer, are disregarded. As with Flournoy, it would appear that Proposition 57's application to Powers depends upon the service upon which his pension allowance is actually calculated. That was service as an officer with a limited amount of legislative service treated as though it was, and which may thus be "deemed" to have been, as an officer.

We do not suggest that this interpretation of the first sentence of Proposition 57 is the only possible interpretation. We hold only that it is a plausible interpretation and not one that is foreclosed by the language used. We must look elsewhere to determine whether this is the meaning intended by the voters. In doing so our first point of reference must be to other provisions of Proposition 57. These other provisions provide convincing proof that our interpretation is the correct one.

In Proposition 57 the second portion of subdivision (a) of section 7, article III, of the state Constitution, futher defines the persons to whom the measure applies as follows: "and all or any part of whose retirement allowance is calculated on the basis of the compensation payable to the officer holding the office

which the member last held prior to retirement, or for the survivor or beneficiary of such a person, . . ." This is an apt description of petitioners. Of course, petitioners would argue that the use of the conjunctive "and" in subdivision (a) sets up a two-prong test, both of which must be satisfied for it to apply. But this argument is dispelled by reference to subdivision (b), which reiterates: "This section shall apply to any person, survivor, or beneficiary described in subdivision (a) who receives, or is receiving, from the Legislators' Retirement System a retirement allowance on or after November 5, 1986, all or any part of which allowance is calculated on the basis of the compensation payable to the officer holding the office which the member last held prior to retirement." Under petitioners' interpretation this

provision is a pure redundancy, merely reiterating one of the two prongs for determining whether the measure applies. This is a construction which is to be avoided since it would render nugatory a discrete and specific subdivision of the measure. (*Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735; *People v. Craft* (1986) 41 Cal.3d 554, 561.) In our view, subdivision (b) was intended to emphasize that the measure was intended to apply to all persons, including petitioners, whose allowances are calculated on the basis of the salaries of incumbent constitutional officers.

In subdivision (c) the voters declared their intent in enacting Proposition 57: "It is the intent of the people, in adopting this section, to restrict retirement allowances to amounts reasonably to be expected by certain members and

retired members of the Legislators' Retirement System and to preserve the basic character of earned retirement benefits while prohibiting windfalls and unforeseen advantages which have no relation to the real theory and objective of a sound retirement system." This language closely parallels language used by this court in upholding similar restrictions upon retirement allowances of retired members of the Legislature in *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774.

In Lyon we noted that the original purpose of tying retirement allowances to incumbents' salaries, a fluctuation formula, was to enable retired officers to maintain a fairly constant standard of living despite fluctuations in living costs. (271 Cal.App.2d at p. 783.) A fluctuation formula is an indirect means of adjusting for cost of living increases

since the adjustment is dependent upon adjustments in salary levels. (Ibid.) Many years after enactment of the LRL the Legislature became convinced that the fluctuation formula was not serving its function so it provided for direct and automatic pension adjustments based upon changes in the cost of living as measured by the Consumer Price Index. The adoption of a direct cost of living adjustment formula had the effect of rendering the indirect fluctuating benefit formula irrelevant to the cost of living objective of the retirement law, since that objective is completely satisfied by the direct adjustment. (Id. at p. 785.) To the extent that the fluctuation formula continues to operate it can be only described as a windfall benefit with no relation to the real theory and objective of a sound pension system. (Id. at p.

787.) This is as true with respect to Flournoy and Powers as it is with respect to any other retired constitutional officer who claims both Consumer Price Index cost of living adjustments and a fluctuating benefit formula. The expressed purpose of Proposition 57 was to prohibit these windfalls and unforeseen advantages which have no relation to the real theory and objective of a sound retirement system. The people's expression of purpose admits of no exceptions; they clearly did not intend to preserve extraordinary windfall payments for some former officers while prohibiting them for others.

In article III, section 7, subdivision (d), the people and the Legislature found and declared that the dramatic increase in retirement allowances which would otherwise result from the salary

increases for constitutional officers which were to become effective after the November 1986 election, could not have been reasonably expected and that the Legislature did not intend to provide for such windfall benefits in its scheme of compensation for such officers. As with the declaration of intent in subdivision (c), the findings and declarations in subdivision (d) admit of no exception; they are as applicable to Flournoy and Powers as they are to any other former constitutional officer who is in a position to claim two separate pension allowance adjustments.

The findings and declarations in subdivisions (b), (c) and (d), constitute emphatic indicators of the intent of the voters in enacting Proposition 57. They establish that Proposition 57 was intended to prohibit future extraordinary

windfall adjustments to the pensions of all former officers whose pensions allowances are based upon an incumbent officer's salary level. In those provisions there is not so much as a hint that some former officers are to continue to receive windfall pension adjustments based upon fortuitous factors which have no relationship to the real theory and objective of a sound retirement system.

Perhaps as fatal to petitioners' argument as the express declarations in Proposition 57 is the fact that there is no conceivable reason why the Legislature and the people would have sought to exempt some former officers from the restrictions of Proposition 57. Through the years the Legislature and the people have acted to place reasonable restrictions upon the benefit levels which members of the Legislature and officers

elected in 1972 or afterward may receive. (Sec. 9359.13; *Allen v. Board of Administration, supra*, 34 Cal.3d 114; *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774.) This left a small number of former constitutional officers, those first elected before 1972, and their survivors and beneficiaries, as the only members of the LRL who were in a position to claim double cost of living adjustments based upon changes both in the cost of living and fluctuations in salary levels. But while their numbers were small, the benefits they claimed were extraordianry. We have already detailed the extraordinary nature of the basic benefit levels payable to retired officers such as petitioners. At the time Proposition 57 was enacted the basic benefit levels were approximately 176 percent of the sitting incumbent's salary. In the absence of

Proposition 57 those benefit levels would continue to skyrocket as the exponential product of both changes in the cost of living and adjustments in salary levels. The situation was regarded as sufficiently pernicious as to warrant a constitutional amendment for correction. This necessity for correction applies as fully to petitioners as it did to any other retired constitutional officer. In short, for purposes of the real theory and objective of a sound retirement system, and the corrective provision of Proposition 57, there is no rational basis to distinguish former officers with some legislative service from former officers who served solely as officers. In determining the meaning of a corrective constitutional measure we must give consideration to the evil to be remedied. (*Cossack v. City of Los Angeles* (1974) 11

Cal.3d 726, 733.) Petitioners' receipt of extraordinary windfall pension benefits was clearly among the evils Proposition 57 was intended to remedy.

We are satisfied from the provisions of Proposition 57 that it was intended to apply to petitioners and thus we need not look for extrinsic evidence of the intent of the Legislature and the voters. Nevertheless, for the sake of argument we have considered extrinsic evidence of intent and find only confirmation that Proposition 57 was intended to apply to petitioners and any other former officer so situated. Proposition 57 was a legislative constitutional amendment which was proposed in the Senate and approved for submission to the voters by both houses of the Legislature. (See Sen. Res. No. 32, Stats. 1986 (1985-1986 Reg. Sess.) res. ch. 57, pp. 5560-5561.) In the

legislative process emphasis was placed upon the unfairness of the windfall benefits received by former officers and the necessity for limiting future windfall increases. There was no suggestion that the proposed restrictions should not apply across the board or that some former officers should be exempt from the restrictions. In fact, an illustrative list of retired officers and their pensions was included in the legislative committee reports. While petitioner Flournoy had not yet retired and was not listed, petitioner Powers and his pension benefits were included in the list. (See Sen. Com. on Public Employees and Retirement Analysis of Sen. Const. Amend. No. 32 (1985-1986 Reg. Sess.).) In view of the repeated assertions that the fluctuating benefit formula should be abandoned for all former constitutional officers,

the lack of any suggestion that any officers should be excluded from the measure, and the specific inclusion of petitioner Powers in the illustrative target list of pensioners, there can be no doubt that the Legislature intended Proposition 57 to apply to all former constitutional officers then receiving benefits on a fluctuation formula, including petitioners.

The ballot summary, analysis, and arguments confirm that this was also the intent of the voters. The ballot summary prepared by the Attorney General's notes that officers who took office before October 7, 1974, have their retirement benefits increased as the incumbent's salary is increased. The summary then states: "This measure amends the Constitution to preclude the retirement benefits of any nonlegislative or nonjudicial

elected state constitutional officers from increasing or being affected by changes in compensation payable to their successors on or after November 5, 1986." The analysis by the legislative analyst was somewhat more detailed. It explained that for officers who took office after October 1974, retirement benefits are based upon their highest salary while in office with annual cost of living adjustments. It explained that officers who took office prior to that date receive pensions based upon the current salary of the office they held plus annual adjustments to their benefits. The analysis states: "This constitutional amendment eliminates the connection between future increases in the salaries of the persons serving in the 11 state offices and the retirement benefits of those officials who took office prior to October 7, 1974.

Thus, beginning November 5, 1986, these retired officers (or their beneficiaries) would receive only one adjustment - an annual cost-of-living increase." (Emphasis in original.) Thus, the Attorney General's summary specifically advised that the measure would apply to all former officers and the legislative analyst's analysis confirmed that view. Neither suggested that there were any exceptions or exemptions from the effect of the measure.

In the ballot arguments it was suggested, for the first time, that there might be a gap in coverage under Proposition 57. Attorney Gary B. Wesley authored a rebuttal to the argument in favor of Proposition 57 and the argument against the measure. The thrust of his rebuttal was that the only way to stop scandalous pension increases may be to

stop large salary increases for current office holders. In support of this view he asserted that Proposition 57 would not prohibit the Legislature from increasing pension benefits on any basis other than the compensation payable to incumbents, and that the courts may be forced to reject Proposition 57. He also asserted that the measure applies only to officers who never served in the Legislature. In his argument against Proposition 57, Mr. Wesley, among other things, suggested that the measure would not place any limit of benefits to a person whose service was not limited to service as an officer. He used Governor Deukmejian as an example and asserted that due to his prior service in the Legislature his benefits could "continue to soar based on later increases in compensation to subsequent officerholders." The rebuttal to this

argument was presented by two State Senators, including the author of Proposition 57, Senator Deddah, and a member of the State Board of Equalization. They asserted: "Mr. Wesley writes that Proposition 57 does not limit pensions earned by retirees who served in other elected offices before becoming constitutional officers. Again, Mr. Wesley is absolutely WRONG. A great deal of care was taken to make sure that Proposition 57 would limit the future benefits of each and every one of the 16 former officers who receive these unconscionable pensions." Thus, in the sole instance in which a possible exclusion or exemption from Proposition 57 was suggested, the voters were assured emphatically that it would apply to all former officers receiving double cost of living adjustments.

The legislative history, and the

ballot summary, analysis and arguments, serve to reinforce the intent we find so apparent in Proposition 57 itself. We are satisfied beyond any reasonable doubt that the Legislature and the voters intended Proposition 57 to be an across-the-board restriction upon future windfall pension increases based upon salary increases for constitutional officers. The Legislature and the voters did not intend to exempt petitioners or any other former officers from this restriction.

When the intent behind a measure is so apparent we are required to give effect to that intent if it is at all possible to do so. In short, "[l]iteral construction should not prevail it if is contrary to the legislative intent apparent in the [measure]. The intent prevails over the letter, and the letter will, if possible, be so read as to

conform to the spirit of the act." (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735; *ITT World Communications, Inc. v. City and County of San Francisco, supra*, 37 Cal.3d at 867; *People v. Belton*, (1979) 23 Cal.3d 516, 526.) Of course, there are limits. We may not indulge in an absurd or unreasonable construction of the language employed. (*Friends of Mammoth v. Board of Supervisors, supra*, 8 Cal.3d at p. 259.) But where the intent is clear we must give effect to that intent so long as the language used is sufficiently flexible to admit of a construction which will effectuate that intent. (*Ibid; In re Haines* (1935) 195 Cal. 605, 613.)

We have already indicated that we find the language of Proposition 57 to be "sufficiently flexible" as to encompass petitioners. Proposition 57 was intended

to apply when a retiree's pension benefits are based upon service as an officer or upon service which is treated in the benefit formula as though it was as an officer. Both petitioners meet this basis for application of Proposition 57. To conclude that petitioners are exempt from Proposition 57 based upon service which is disregarded in the calculation of their pension allowances would defeat rather than foster the clear purpose and intent behind that measure. Accordingly, we conclude that Proposition 57 does not apply to petitioners. By doing so we foster rather than frustrate the purpose of Proposition 57 (*People v. Bellici* (1979) 24 Cal.3d 879, 884-885), we avoid the absurd result of prohibiting unconscionable pension increases for some officers while preserving them for others based upon factors unrelated to the

theory and objective of a sound pension system and Proposition 57 (*ITT World Communication, Inc. v. City and County of San Francisco, supra*, 37 Cal.3d at p. 867); and we achieve the most reasonable result from among the possible interpretations of the measure (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735).

IV

A Concluding Caveat.

In this proceeding petitioners have contended that Proposition is unconstitutional on its face and, in the case of Flournoy and Powers, that it does not apply to them by its terms. We have considered and rejected these facial attacks upon the constitutionality and application of Proposition 57. There may be individual, fact based grounds for seeking relief, partial or otherwise, from the provisions of Proposition 57.

For example, petitioner Riles had 10.846 years credit under PERS before becoming Superintendent of Public Instruction and electing to join the LRL instead of remaining in PERS as was his option. Had he remained in PERS he would have 22.846 years of credit in that system. He now asserts that if he had remained in PERS he would be entitled to receive greater benefits than his combined PERS and LRL benefits under Proposition 57. While this appears highly unlikely,[15] it does

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15. Riles states that at the time of filing the replication he was receiving monthly LRL benefits of $1,615.68 and PERS benefits of $995.14 for combined benefits of $2,610.82. He asserts that he was advised that had he remained in PERS then at the time of his 1983 retirement he could have selected an optional settlement to provide for his wife and still receive $3,500 per months in benefits. The basic PERS benefit for a person who retires at age 60 is 2 percent per year of service times the person's final compensation. (Sec. 21251.13.) This would give Riles a basic benefit of less than 46 percent of his final compensation, yet the amount he asserts he could have received is approximately equal to his final compensation. Thus, it would appear that the advice Riles was

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serve to point out that there may be individual circumstances in support of an individual claim for relief from Proposition 57. We have not been provided sufficient information to attempt to resolve any individual claims for relief. Moreover, since such claims would necessarily involve factual determinations, this is an inappropriate forum for consideration of such issues in the first instance. Accordingly, our consideration of Proposition 57 in this case has been limited to the facial constitutional validity of that measure. Our conclusion is without prejudice to the presentation of any individual claims which petitioners or other affected parties may wish to assert.

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nued...

given was quite erroneous.

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DISPOSITION

The alternative writs having served their purpose are discharged. The petitions for a peremptory writ of mandate are denied. (CERTIFIED FOR PUBLICATION.)

SPARKS , J.

I concur:

PUGLIA , P.J.

I concur in the result:

DeCRISTOFORO , J.

APPENDIX B

APPENDIX B

DENIAL OF PETITION FOR REHEARING

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

FILED
OCT 01 - 1990
COURT OF APPEAL 3RD DISTRICT
ROBERT L. LISTON, CLERK
BY _____, DEPUTY

VIRGINIA KNIGHT, ET AL.
Petitioners

vs. 3 Civil C005934
Sacramento

BOARD OF ADMINISTRATION
OF PERS
Respondent

- - - - - - - - - - - - - -

HOUSTON I. FLOURNOY ET AL.
Petitioners

vs. 3 Civil C005622
Sacramento

BOARD OF ADMINISTRATION
OF PERS

By the Court:

Petitioners' petition for rehearing is denied.

Dated: October 1, 1990

PUGLIA, P.J.

APPENDIX C

APPENDIX C

DENIAL OF PETITION FOR HEARING

SUPREME COURT
FILED
Dec 20. 1990
Robert Wandruff Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Third Appellate District No. C005934/C005662
S017916

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

VIRGINIA KNIGHT, Et Al., Petitioners

v.

BOARD OF ADMINISTRATION, Etc., Respondent

And Companion Case

Petition for review DENIED.

The Reporter of decisions is directed not to publish in the Official Appel-

late Reports the opinion in the above entitled appeal, filed September 4, 1990, which appears at 223 Cal.App.3d 527. (Cal. Const., Art. VI, Section 14, Rule 976, Cal. Rules of Court.)

Mosk, J. did not participate.

LUCAS
Chief Justice

APPENDIX D

APPENDIX D

PROPOSITION 57: ARTICLE III, SECTION 7 OF THE CALIFORNIA CONSTITUTION

(a) The retirement allowance for any person, all of whose credited service in the Legislators' Retirement System was rendered or was deemed to have been rendered as an elective officer of the state whose office is provided for by the California Constitution, other than a judge and other than a Member of the Senate or Assembly, and all or any part of whose retirement allowance is calculated on the basis of the compensation payable to the officer holding the office which the member last held prior to retirement, or for the survivor or beneficiary of such a person, shall not be increased or affected in any manner by changes on or after November 5, 1986, in the compensation payable to the officer holding the office which the member last

held prior to retirement.

(b) This section shall apply to any person, survivor, or beneficiary described in subdivision (a) who receives, or is receiving, from the Legislators' Retirement System, a retirement allowance on or after November 5, 1986, all or any part of which allowance is calculated on the basis of the compensation payable to the officer holding the office which the member last held prior to retirement.

(c) It is the intent of the people, in adopting this section, to restrict retirement allowances to amounts reasonably to be expected by certain members and retired members of the Legislators' Retirement System and to preserve the basic character of earned retirement benefits while prohibiting windfalls and unforeseen advantages which have no relation to the real theory and objective of

a sound retirement system. It is not the intent of this section to deny any member, retired member, survivor, or beneficiary a reasonable retirement allowance. Thus, this section shall not be construed as a repudiation of a debt nor the impairment of a contract for a substantial and reasonable retirement allowance from the Legislators' Retirement System.

(d) The people and the Legislature hereby find and declare that the dramatic increase in the retirement allowances of persons described in subdivision (a) which would otherwise result when the compensation for those offices increases on November 5, 1986, or January 5, 1987, are not benefits which could have reasonably been expected. The people and the Legislature did not intend to provide in its scheme of compensation for those offices such windfall benefits.

APPENDIX E

APPENDIX E

GOVERNMENT CODE OF CALIFORNIA

Section 9354. LEGISLATORS' RETIREMENT FUND

The Legislators' Retirement Fund in the State Treasury is hereby established. All moneys received by this system pursuant to this chapter shall be deposited in the fund, and all retirement allowances, benefits, optional settlements and other obligations or payments payable by this system pursuant to this chapter shall be paid from the fund. . .

SECTION 9359. RETIREMENT AGE; APPLICATION FOR RETIREMENT

. . . (b) any member who hereafter becomes a member of this system who has attained age 60 and **who is entitled to be credited with four (4) or more years of service, . . . shall be retired, and thereafter shall receive for life the retirement allowance provided in this chapter.** . . (Emphasis added.)

SECTION 9359.1. RETIREMENT ALLOWANCE; AMOUNT

(b) The retirement allowance for a member all of whose credited service was rendered as an elective officer of the state whose office is provided for by the Constitution other than a judge (and other than a Member of the Senate or Assembly) the sum of (1) **is an annual amount equal to five percent (5%) of the compensation payable at the time payments of the allowance fall due, to the officer holding the office which the retired member last held prior to his retirement,** (Emphasis added.) or five percent (5%) of the highest compensation fixed for such office during the member's last term or any subsequent term prior to his retirement, which ever is greater, multiplied by the number of years of service with which the member is entitled to be credited at the time of his retirement, not

to exceed eight years, plus, if the member is credited with 24 of more years of service, (2) one and two-thirds percent (1 2/3%) of the compensation to which the five percent (5%) rate is applicable under subparagraph (1) of this subdivision for his first eight years of credited service, multiplied by the number of years of service in excess of eight years with which the member is entitled to be credited at the time of his retirement, not to exceed 12 years of such credited service in excess of the eight years of service referred to in subparagraph (1) of this subdivision. [1]

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1. Section 9359.1 as it read prior to the 1974 amendment which substituted, following "five percent (5%) of", the words, "the highest compensation received by the officer while serving in such office." for "the compensation payable at the time payments of the allowance fall due, to the officer holding the office which the retired member last held prior to his retirement, or five percent (5%) of the highest compensation fixed for such office during the member's last term or any

SEC. 9360.9. COST OF LIVING ADJUSTMENTS

Notwithstanding any other provisions of this chapter, the provisions of this section shall be applicable to all allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964.

On or before January 1, 1964, the board shall adjust the amount of the allowances payable during the 1964 calendar year to reflect any increase in cost of living occurring between the 1963 calendar year and the 1955 calendar year, inclusive, and any increase resulting from such adjustment shall be payable commencing with each installment of allowances paid

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.Continued...

subsequent term prior to his retirement, whichever is greater."

The 1974 amendments also provided: "The amendments to this section during the 1973-1974 Second Extraordinary Session shall not be applicable to members who are retired on the effective date of such amendments."

or payable on or after January 1, 1964. On or before January 15, 1965, and on or before January 15 of each year thereafter, the amount of the allowances provided by this chapter shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding year. . .[2]

SEC. 9361 ELECTION OF OPTIONAL SETTLEMENT

In lieu of the retirement allowance for his life alone, a member or retired member may elect . . to have the actuarial equivalent of his retirement allowance as of the date of retirement applied to a lesser retirement allowance, in accordance with one of the optional settlements specified in this article.

---

2. As enacted in 1963. The 1974 amendments added the following clause at the end of the first paragraph: ". . . and members who are elective officers of the state whose offices are provided by the Constitution and who were first elected to any such office prior to January 1, 1966."

SEC. 9361.1 TIME FOR ELECTION OF OPTIONAL SETTLEMENT

Such election . . . may be made at any time . . .**prior to the making of the first payment on account of any retirement allowance.** . . (Emphasis added.)

SEC. 9361.2 OPTIONAL SETTLEMENT 1

Optional Settlement 1 consists of the right to have a retirement allowance paid him until his death. . .

SEC. 9361.3 OPTIONAL SETTLEMENT 2

Optional Settlement 2 consists of the right to have a retirement allowance paid him until his death and thereafter to his beneficiary for life.

SEC. 9361.4 OPTIONAL SETTLEMENT 3

Optional Settlement 3 consists of the right to have a retirement allowance paid him until his death, and thereafter to have one-half of his retirement allowance paid to his beneficiary for life.

APPENDIX F

APPENDIX F

HISTORICAL ANALYSIS OF INCOME AND EXPENDITURES OF LEGISLATORS' RETIREMENT SYSTEM, 1947-1989

Fiscal Year	Member Contributions	Income From Investments	State Contributions	Total Benefit Expenditures
47-48	—[1]	—	—	—[1]
48-49	$13,338.25	$43.75	—	$1,883.83
49-50	13,553.73	331.25	$7,000.00	7,776.28
50-51	25,295.38	1,256.25	28,000.00	18,876.63
51-52	25,264.12	2,079.03	28,500.00	28,329.29
52-53	27,341.74	2,991.69	44,000.00	42,278.75
53-54	23,508.15	4,045.96	51,600.00	59,766.30
54-55	32,496.32	4,418.66	55,000.00	66,771.34
55-56	34,711.35	5,809.68	70,000.00	55,176.63
56-57	36,068.56	6,619.96	50,000.00	76,062.80
57-58	35,084.60	7,894.96	58,000.00	84,451.73
58-59	36,889.30	8,763.44	90,000.00	95,222.35
59-60	37,614.20	12,479.17	152,000.00	127,616.48
60-61	38,028.68	13,402.84	120,000.00	136,803.91

1. Pending Supreme Court decision of August 13, 1948.

HISTORICAL ANALYSIS OF INCOME AND EXPENDITURES OF LEGISLATORS' RETIREMENT SYSTEM, 1947-1989
(Continued)

Fiscal Year	Member Contri-butions	Income From Investments	State Contributions	Total Benefit Expenditures
61-62	44,256.83	17,398.55	140,000.00	180,916.22
62-63	42,207.99	18,516.46	210,000.00	225,520.13
63-64	50,054.85	23,023.03	279,862.10	309,626.37
64-65	41,299.88	27,802.97	335,137.90	338,696.49
65-66	40,341.74	32,349.38	360,000.00	321,339.67
66-67	73,206.05	41,031.51	370,000.00	411,392.26
67-68	91,793.71	51,115.62	510,000.00	473,182.59
68-69	89,510.64	61,395.59	450,000.00	558,231.76
69-70	126,348.87	77,685.09	540,000.00	598,690.87
70-71	105,429.91	85,079.04	550,000.00	624,327.11
71-72	115,026.41	112,853.51	1,039,166.47	692,085.40
72-73	124,090.56	131,756.19	639,638.00	869,803.73
73-74	132,120.35	157,048.34	654,171.00	925,473.72
74-75	142,122.06	217,045.02	1,143,538.00	1,062,802.25
75-76	154,429.83	212,730,74	1,291,788.00	1,279,546.47
76-77	166,480.21	232,782.78	1,234,759.00	1,386,870.34
77-78	191,774.29	2,376,116.02	29,380,775.15	1,568,439.80

HISTORICAL ANALYSIS OF INCOME AND EXPENDITURES OF LEGISLATORS' RETIREMENT SYSTEM, 1947-1989
(Continued)

Fiscal Year	Member Contributions	Income From Investments	State Contributions	Total Benefit Expenditures
78-79	189,095.75	2,669,770.42	605,650.85	1,948,860.68
79-80	202,566.43	2,877,874.46	605,470.07	2,141,156.09
80-81	224,700.78	3,055,128.52	630,671.05	2,493,774.06
81-82	251,330.22	3,517,490.44	659,359.06	2,827,822.63
82-83	237,951.78	3,794,455.47	636,804.04	3,034,531.13
83-84	270,544.58	3,994,976.07	643,551.21	3,086,778.26
84-85	290,093.94	4,160,252.95	735,678.91	3,161,004.47
85-86	330,048.33	4,189,168.89	817,448.24	3,303,905.36
86-87	343,455,37	3,873,694.89	860,618.26	3,643,958.93
87-88	394,272.23	3,876,724.64	941,595.31	3,919,394.75
88-89	393,970.10	4,242,358.81	991,095.63	4,066,427.35
Totals:	$5,237,718.07	$44,197,762.04	$48,010,878.25	$46,255,575.21

Annual Financial Report, Report of Operations and Legislators' Retirement Law Fiscal Year Ended June 30, 1988 and June 30, 1989 prepared and published by PERS in accordance with Gov. Code Sec. 9354.3. (Petition for Rehearing, pp. 16-17.)

APPENDIX G

APPENDIX G

LETTER TO COUNSEL FROM COURT OF APPEAL

OFFICE OF THE CLERK
COURT OF APPEAL
THIRD APPELLATE DISTRICT
State of California

September 27, 1989

. . (Addresses of counsel). .

Re: VIRGINIA KNIGHT, ET AL. vs.
BOARD OF ADMINISTRATION OF PERS
3 CIVIL C005934/C005622

Dear Counsel:

The court hereby requests that counsel address the following three questions in supplemental briefs. Counsel for petitioners is granted to, and including, October 27, 1989, within which to file their brief and respondent is granted thirty (30) days after the receipt of petitioners' brief to file its reply brief.

As a preface to those questions, the court notes that in this state governmental pension plans are typically funded

through: (1) an actuarial-based fund; (2) continuing state appropriations or continuing obligations against local government entities; or (3) a combination of both. (See, e.g., Gov. Code, Secs. 200751, 29757, 31963-31964, 32029-32032, 45342. See also 19 Cal.Jur.3d (1979) Pensions and Retirement Systems, Sec. 11, pp. 224-225.) It has been said that where it is feasible to do so a pension plan should be construed to provide adequate funds or an appropriation for the payment of benefits as they fall due. (*Carmen v. Alvord* (1982) 31 Cal.3d 318, 332.) From its enactment in 1947 until January 1, 1978, the Legislators' Retirement Law appears to be virtually unique among California governmental pension laws. The Legislature recognized the members' contributions would be inadequate for the funding of benefits, but

nonetheless declined to create an actuarial fund or to provide a continuing appropriation for the payment of benefits. Instead, the funding for the payment of benefits was left to future appropriations. (Former Gov. Code, Sec 9358, Stats. 1947, ch. 879, Sec. 1, p. 2062.) And the Legislature provided: "The provisions of Section 9358 do not constitute an appropriation of money from the State Treasury. The sum required for state contributions shall be appropriated in each State Budget Act, or otherwise." (Former Gov. Code, Sec. 9358.1, Stats. 1947, ch. 879, Sec. 1, p. 2062.)

While the state cannot avoid its obligations by repealing existing appropriations (*McCauley v. Brooks, supra*, 16 Cal. at p. 34), its contractual obligations are said to be limited to the extent of valid existing appropriations.

(See *California State Employees' Assn. v. Flournoy, supra; California State Employees' Assn. v. State of California, supra.* See also *Leiter v. United States* (1926) 271 U.S. 204; and the Annotation Damages Limitation - Government Contract, 40 A.L.R. 4th 998.) And, under California law, it has been noted that in order for the state to incur enforceable obligations there must be an existing appropriation in support of those obligations. (*Riley v. Johnson* (1933) 219 Cal. 513, 520-521.) In general, if the Legislature has failed to make a valid appropriation for a specific purpose, then no enforceable contract obligation can be incurred. (*Ingram v. Colgan, supra, McCauley v. Brooks, supra; Myers v. English, supra; California State Employees' Assn v. Flournoy, supra; California State Employees' Assn. v. State of California,*

supra.)

Question No. 1: In view of these authorities, and in light of the virtually unique nature of the Legislators' Retirement Law, can it be said that petitioners acquired contractual rights to a specific formula for the calculation of retirement benefits which cannot be altered or amended under the impairment of contract clause of article I, section 10 of the United States Constitution? (See *Dodge v. Board of Education* (1937) 302 U.S. 74, [52 L.Ed. 57]; *Phelps v. Board of Education* (1936) 300 U.S. 319, [81 L.Ed. 674].)

Question No. 2: Effective January 1, 1978, the Legislature repealed former Government Code sections 9358 and 9358.1, and enacted a new section 9358 to provide for state contributions to an actuarial retirement fund and to make a continuing

appropriation for the payment of such contributions. (Stats. 1977, ch. 937, Sec. 1-4, p. 2864.) What effect, if any, does that legislation have upon the claims of the petitioners whose state service was entirely before the effective date of such legislation?

Question No. 3: What effect, if any, does the 1977 enactment have upon the claims of petitioners Riles and Nevins, whose service included periods of actual service after the effective date of the legislation?

The court is deeply appreciative of counsel's assistance in this case by the filing of supplemental briefs.

Very truly yours,

ROBERT L. LISTON, Clerk

By: /s/Diana C. Fawcett
Chief Deputy Clerk

APPENDIX H

APPENDIX H

BETTS V. BOARD OF ADMINISTRATION
(1978) 21 CAL.3D.859

RICHARDSON, J.-- Petitioner, who served as Treasurer of the State of California from 1959 to 1967, seeks a writ of mandate directing respondent Board of Administration (Board) of the Public Employees' Retirement System to compute his retirement benefit on the basis of the salary payable to the present Treasurer, rather than on the basis of the highest salary received by petitioner during his term of office. The principal issue involves the effect of 1974 amendments to the Legislators' Retirement Law (Gov. Code, Sec. 9350 et seq.) which replaced a "fluctuating" system of computing retirement benefits with a "fixed" system. We conclude that petitioner is entitled to the relief he seeks and will therefore issue a peremptory writ of mandate. (All

statutory references are to the Government Code unless otherwise indicated.)

Petitioner held the office of Treasurer from January 5, 1959, to January 2, 1967. As an elected constitutional officer, being eligible, he chose to participate in the Legislators' Retirement Fund (Fund) while holding office (Sec. 9355.4).

At all times during petitioner's incumbency, the basic retirement benefit available to retired members of the Fund was governed by section 9359.1, subdivision (b), which then provided, in pertinent part: "The retirement allowance for a [nonlegislative member] . . . is an annual amount equal to five percent (5%) of the compensation payable at the time payments of the allowance fall due, *to the officer holding the office which the retired member last held* prior to his

retirement, *or* five percent (5%) of the highest compensation *fixed for such office* during the member's last term or any subsequent term prior to his retirement, whichever is greater, multiplied by [years of service credit]. . . ." (Italics added.) Under this "fluctuating" system, a retired member's monthly allowance would be adjusted periodically throughout the term of the pension to reflect changes in the salary payable to the *current* incumbent of the elective office the member had previously held.

In 1974, after petitioner had left office but before his retirement and application for benefits, the Legislature changed the method of benefit computation. Under amended section 9359.1, the basic benefit allowance became "an annual amount equal to five percent (5%) of the highest compensation received *by the*

officer while serving in such [nonlegislative elective] office," multiplied by years of service credit. An additional allowance was provided in certain cases for persons with 24 or more years of credited service: these provisions do not apply to petitioner. (Sec. 9359.1. subd.(b).) The amendment was expressly made inapplicable to members who had "retired" on its effective date.

The effect of the 1974 amendment was to substitute a "fixed" system of benefit computation for the prior "fluctuating" system. Under the new law, the basic benefit payable to a member retiring after October 7, 1974, is computed only on the basis of the highest salary he himself received while serving in a constitutional office covered by the Fund.

The highest annual salary received

by petitioner as Treasurer was $21,499. In 1969, after petitioner left office, the Treasurer's salary was raised to $35,000 per year, the current level.

In 1976, petitioner retired on the basis of total disability and applied for his benefits from the Fund. He was advised that his allowance would be computed under the 1974 amendment, on the basis of petitioner's highest salary in office, $21,499. Petitioner requested an administrative hearing. The administrative judge found that petitioner was entitled to benefits computed on the basis of the current $35,000 salary, under the law as it existed in 1967, when the petitioner left elective office. The Board reversed the determination of the administrative judge and this petition followed.

Petitioner's principal contention is

that application of the 1974 amendment to him interferes with his vested contractual right to an earned pension. We agree. (Emphasis added.)

A long line of California decisions has settled the principles applicable to the problems herein presented. A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. (*Kern v. City of Long Beach* (1947) , 852-853 [179 P.2d 799].) The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a "substantial or reasonable pension." (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183 [265

P.2d 884].) Moreover, the employee's eligibility for benefits can, of course, be defeated "upon occurrence of a condition subsequent." (*Kern, supra*, at p. 853.)

However, there is a strict limitation on the conditions which may modify the pension system in effect during employment. We have described the applicable principles as follows: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time to maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable,

alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages*. [Citations.] . . . (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [287 P.2d 765], italics added.) We recently reaffirmed these principles in *Miller v. State of California* (1977) 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557 P.2d 970].

In *Allen, supra*, we explained why the substitution of a "fixed" system of benefit computation for a fluctuating" system constitutes a disadvantage to affected employees: "Payment of a fixed amount freezes the benefit at a figure which is based on salary scales preceding retirement, thus the longer an employee

is retired on a fixed pension the more likely it is that the amount of his pension will not accurately reflect existing ecomonic conditions, whereas a retired employee receiving a fluctuating pension based on the salaries that active employees are currently receiving can maintain a fairly constant standard of living despite changes in our economy." (45 Cal.2d at p. 132.) In inflationary times, we observed, the resulting disadvantage of a "fixed" system is obvious; but the very unpredictability of economic cycles also "indicated the advantage of a plan for fluctuating benefits which attempts, however roughly, to reflect the actual purchasing power of the dollar . . . ." (45 Cal.2d at p. 132; see also *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 448 [326 P.2d 484]; *Chapin v. City Commission* (1957) 149 Cal.App.2d 40, 44-

45 [307 P.2d 657].)

Judicial attention has also been given to the subject of "comparable new advantages." The comparative analysis of disadvantages and compensating advantages must focus on the particular employee whose own vested pension rights are involved. (*Abbott v. City of Los Angeles, supra* 50 Cal.2d at pp. 449-453; *Frank v. Board of Administration* (1976) 56 Cal. App.3d 236, 245 [128 Cal.Rptr. 378]; See *Abbott v. City of San Diego* (1958) 165 Cal.App.2d 511, 518 [332 P.2d 324].) It has been said that the offsetting improvement must also "relate generally to the benefit that has been diminished." *Frank, supra*, at p. 244; *Stork v. State of California* (1976) 62 Cal.App.3d 465, 471 [133 Cal.Rptr. 207].)

The Board urges that 1963 amendments to the pension plan provide the necessary

offsetting advantage in this case. In that year, the Legislature added section 9360.9, which requires automatic annual adjustment of pension benefits to reflect upward changes in the cost of living. Each January 1, under this statute, the previous year's benefit is multiplied by that year's average increase in the Bureau of Labor Statistics cost-of-living indices for San Francisco and Los Angeles, respectively, using 1954 as the base year. The product of this calculation becomes the basis of the benefit payable for the ensuing year.

Thus, the Board argues, one "cost of living" formula was simply replaced by another; petitioner, it urges, had no reasonable expectation when he left office that he would enjoy the "double windfall" of the cost-of-living index formula provided by section 9360.9 *plus*

the "fluctuating" benefit adjustment, the increasing salary scale, mandated by the pre-1974 version of section 9359.1. Under the circumstances of this case, the Board's contention cannot be sustained.

In asserting that termination of the "fluctuating" system was reasonable here, the Board relies heavily on *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774 [76 Cal.Rptr. 869]. The Court of Appeal in *Lyon* faced an unusual fact situation which was historically unique. Petitioner's decedent in that case had retired from the Legislature in 1955 and commenced drawing a monthly allowance from the Fund. At the time of decedent's retirement and for more than 10 years thereafter, the salary for members of the Legislature was $500 per month. Decedent's allowance and, after his death, that of petitioner, his widow, were

computed on the basis of this salary.

Meanwile, repeated attempts to liberalize legislative salaries by constitutional amendment were rejected by the voters; referendum propositions of this kind were defeated in 1958, 1960 and 1962. In 1966, however, a broader partial constitutional revision was successful at the polls. This measure (Proposition 1-A) repealed the $500 per month salary, authorized the Legislature to set its own salaries, and validated a 1966 statute fixing members' salaries at $16,000 per year, beginning with the 1967 term. (See Cal.Cons., art. IV, sec. 4, and former art. XXII, sec. 6, as adopted Nov. 8, 1966; Gov. Code. 8901.)

However, the 1966 amendments also included a clause prohibiting any member who had retired prior to 1967 from receiving retirement benefits computed on

the basis of the new salaries and limited computation of the retirement benefits of such members to the pre-1967 salary of $500 per month. (Cal. Const., *supra*, art. sec. 4.) The Legislature incorporated this requirement into the Legislators' Retirement Law itself. (Sec. 9359.11.)

Petitioner Lyon contended that her husband had earned a "vested right" to computation of benefits on the basis of the salary provided by the 1966 constitutional amendments, under the "fluctuating" system in effect at his retirement. The appellate court concluded that the purpose of a "fluctuating" pension system was to provide retirees some insulation against normal variations in the cost of living; the substantial increase in salary from $500 per month ($6,000 per year), it said, had no relation to this purpose. Rather, it was

simply the result of long-term legislative frustration over voter resistance to increased salaries. The Legislature, observed the *Lyon* court, had already compensated retirees for the hardship caused by the 12-year salary "freeze" by its 1963 adoption of the cost-of-living adjustment established in section 9360.9. Petitioner's decedent, said the court, had no "reasonable expectation" while in office that he would enjoy a *double* cost-of-living formula, particularly where his contributions to the Fund had been based on the pre-1967 salary he received. The Legislature, the court concluded, properly forestalled such a "windfall" by replacing one "cost-of-living" factor --the "fluctuating" system of benefit computation based on variation in current salaries--with another--a formula adjustment based directly on increases in the

cost of living. (271 Cal.App.2d at pp. 783-786.)

In *Lyon*, accordingly, *after the member's retirement*, the cost-of-living formula in effect during his active service was replaced by another. The Court of Appeal was therefore entirely correct in saying that the decedent had earned no contractual expectation *while in office* that he would receive the benefit of *both* systems. In contrast to *Lyon*, in the instant case, the 1963 enactment of section 9360.9 occurred *during* petitioner's term as Treasurer, which ran from 1959 to 1967; the "fluctuating" system of benefit computation was also in effect during this entire period. An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but 262h

which are thereafter conferred during the employee's subsequent tenure.

Thus, in *Abbott v. City of Los Angeles, supra*.50 Cal.2d 438, the city argued that pension benefits added during 1923 had the effect of offsetting the detriments incurred by public safety employees as a result of 1925 and 1927 amendments to the city's pension plan. Rejecting this contention, we said, "the member plaintiffs and the husbands of the widow plaintiffs rendered services to the city after January of 1923 and prior to the amendments of 1925 and 1927, and therefore . . . had earned and vested rights in the retirement benefits already provided by the city charter *during that period of time*. [Citations.] It follows that advantages added prior to *or during* 1923 have no bearing upon the reasonableness of the detriments

resulting from the 1925 and 1927 amendments." (50 Cal.2d at p. 448, italics added.) Futhermore, "The benefits conferred under a pension system by changes which are made from time to time prior to the adoption of an amendment imposing a detriment 'have no bearing upon the reasonableness' of the detriment so imposed [citing *Abbott v. City of Los Angeles, supra*]; such benefits become a part of the vested rights of the emplyees when conferred." (*Abbott v. City of San Diego, supra*, 165 Cal.App.2d 511, 518; see also *Santin v. Cranston* (1967) 250 Cal.App.2d 438, 441 [59 Cal.Rptr. 1].)

From application of the foregoing principles to the case before us we conclude that the prior version of section 9359.1 together with section 9360.9, enacted in 1963, form the basis

by which petitioner's reasonable pension expectations must be measured. For four years, petitioner provided his services under a statutory scheme which *simultaneously* included both computation methods. Under these circumstances, the 1963 enactment cannot be deemed a "comparable new advantage" offsetting the detriment represented by amendment of section 9359.1 in 1974.

We fully recognize that the effect of our holding is that petitioner thereby receives the benefit of a *double* increment of increase, a troubling result. We can only observe that the Legislature must have intended to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period.

We therefore conclude that the 1974 amendment to section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. No "comparable new advantagages" to petitioner appear in the plan which can offset the detriment he has suffered by replacement of a "fluctuating" system of benefit computation with a "fixed" system. Petitioner is therefore entitled to have his basic retirement allowance computed on the basis of section 9359.1 as it read when he left office in 1967. Under the formula therein provided, petitioner's basic pension benefit is to be determined periodically on the basis of the current Treasurer's salary, now $35,000 per year.

The result we reach herein makes it unnecessary to consider petitioner's additional contentions.

Let a peremptory writ of mandate issue, directing the Board to vacate and set aside its decision applying the 1974 amendments to petitioner, and to compute petitioner's basic retirement allowance from the Fund according to the formula provided in section 9359.1 as it appeared on January 2, 1967, when he left the office of Treasurer. Petitioner shall recover his costs of suit.

Bird, C. J., Tobriner, J., Clark, J., Manuel, J., Newman, J., and Tamura, J.,* concurred.

On September 14, 1978, the judgment was modified to read as printed above. Mosk, J., did not participate therein.

---

*Assigned by the Chairperson of the Judicial Council.

No. 90-1621

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VIRGINIA KNIGHT; EDMUND G. BROWN; WILSON RILES; RICHARD NEVINS; HOUSTON I. FLOURNOY; HAROLD J. POWERS,

Petitioners,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioners have a vested right to have their pension allowances calculated on the basis of the salary of incumbent office holders, and, if so, whether Article III, section 7 of the California Constitution unconstitutionally infringes this vested right.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Board of Administration of the Public Employee's Retirement System hereby submits its brief in opposition to the petition for writ of certiorari which seeks review of the unpublished decision of the Court of Appeal of the State of California for the Third Appellate District in this case, Appendix A to the Petition.

STATEMENT OF THE CASE

A. Summary of Material Facts

Petitioners are retired state officials who held statewide constitutional offices in California.[1] Petitioners, or their benefactors, first assumed office prior to October 7, 1974. All petitioners are receiving pension allowances from the California Legislators' Retirement System ("LRS") which is administered by respondent Board of Administration of the Public Employees Retirement System (hereinafter "Board") and governed pursuant to the Legislators' Retirement Law ("LRL"). (Gov. Code, §§ 9350-9378.)[2]

Prior to November 4, 1986, petitioners' retirement allowances were subject to periodic increases based on two cost-of-living factors. The first factor was the current salary for the office the retiree last held. The second

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[1] Petitioner Knight is the widow of a former governor of California and is his pension beneficiary.

[2] All statutory references are to the Government Code, unless otherwise indicated.

factor was the consumer price index using a base year of 1954.

In 1974, the LRL was amended to eliminate the link between retirement benefits and incumbents' salaries for constitutional officers who took office on or after October 7, 1974. The pension of a retired constitutional officer, or his beneficiary, who took office on or after 1974 is based on the highest salary he or she received while in office, and does not increase each time the salary of the office increases. (§ 9359.1(b).)

Since the 1974 amendment applied only to constitutional officers taking office on or after October 7, 1974, the pensions of petitioners and of other constitutional officers who first assumed office prior to 1974 continued to increase exponentially whenever incumbents' salaries increase and when changes occurred in the consumer price index.

In November 4, 1986, the California electorate passed Proposition 57, which, by adding Article III, section 7 to the California Constitution, prevented any future increases in petitioners' retirement allowances resulting from increases in the salaries of incumbent officeholders. Article III, section 7 of the California Constitution provides in part that the pensions of the persons to whom it applies:

> " . . . shall not be increased or affected in any manner by changes on or after *November 5, 1986,* in the compensation payable to the officer holding the office which the member last held prior to retirement." (Emphasis added.)

After the passage of Proposition 57, respondent Board determined and notified petitioners that Article III, section 7, governed the calculation of their pension benefits.[3]

B. Summary Of Procedural History

On or about November 30, 1988, in action number 3 Civil C005622, petitioners Houston I. Flournoy and Harold J. Powers petitioned the Court of Appeal of the State of California, Third Appellate District, to exercise its original jurisdiction and issue an alternative writ of mandate directing the Board of Administration of the Public Employees Retirement System to show cause why their retirement allowances should not be calculated without regard to Proposition 57.

Respondent Board of Administration opposed the petition on the merits but did not oppose the Court of Appeal exercising its original jurisdiction over the matter.

The Court issued the alternative writ and on March 3, 1989, respondent Board filed its Return to the writ.

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[3] In 1986, petitioner Knight's annual pension was $26,858. If Article III, section 7, were not applied to her, her 1987 annual pension would have been $46,494. The comparable figures for petitioner Brown are $62,314 and $107,880; petitioner Riles $17,710 and $22,764; petitioner Flournoy $42,500 and $101,858 and petitioner Powers $59,024 and $100,692. The amount of petitioner Nevins' pension is not a matter of record in this action.

In 1990 there was an additional increase in the salaries of constitutional officers.

On or about January 20, 1989, in action number 3 Civil C005934, petitioners Knight, Brown, Riles and Nevins petitioned the Court of Appeal of the State of California for an original writ of mandate directing respondent to show cause why their retirement allowances should not be calculated without regard to Proposition 57. The Court issued the alternative writ and on March 3, 1989 respondent filed its return to the writ.

On September 27, 1989, in a letter to counsel, the Court of Appeal requested supplemental briefing to address the question whether, in view of the unique and express refusal prior to January 1, 1978 of the Legislature to appropriate funds to support the LRL, the petitioners could have acquired contractual rights, protected by the Contract Clause of the Federal Constitution, to have their retirement benefits calculated according to a specific formula. Thereafter the parties filed supplemental briefs.

On September 4, 1990, the Court of Appeal ordered the two cases consolidated for decision and issued a published opinion denying the petitions (Appendix A to petition).

The petitioners filed a petition for rehearing which the Court of Appeal denied on October 1, 1990.

The petitioners requested review in the California Supreme Court. On December 20, 1990, the California Supreme Court denied the petition for review but directed that the decision of the Court of Appeal not be published in the Official Appellate Reports of the State of California.

REASONS WHY THE WRIT SHOULD BE DENIED

I

CERTIORARI SHOULD BE DENIED BECAUSE ARTICLE III, SECTION 7 DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION

Petitioners contend that certiorari must be granted because Article III, section 7 of the California Constitution destroys, in violation of the Contract Clause of the United States Constitution, their vested contract right to have their pension benefits increased whenever the salary of incumbent officeholders is increased. There is no merit in this contention.

Article I, section 10, clause 1 of the federal constitution provides in part: "No state shall . . . pass any . . . law impairing the obligation of contracts, . . . " This clause prohibits a state from impairing, by legislation, the obligation of its own contracts, as well as the obligation of the contracts of individuals. (*Woodruff* v. *Trapnall* 51 U.S. (10 How.) 190, 206 (1850).) A provision of a state constitution may be a "law" within the meaning of the contract clause. (*Bier* v. *McGehee* 148 U.S. 137, 140 (1893).)

1. Under California Law Petitioners Did Not Have a Vested Right to Have Their Retirement Allowance Calculated Pursuant to a Particular Formula.

In this, as in most cases brought under the Contract Clause, the question of whether there has been an unconstitutional impairment of a contract is resolved by determining whether the allegedly impaired contract right actually exists, and if so, by determining the nature of

this right, rather than upon a construction of the law which is said to impair it. (*Indiana* ex rel. *Anderson* v. *Brand* 303 U.S. 95, 100 (1938) [82 L.Ed. 685, 690, 58 S.Ct. 443, 113 A.L.R. 1482].) The determination whether a contract exists, and its meaning, require reference to state law. (*Ibid.*)

When presented with a claim that a statutory scheme has created a contract, this Court exercises independent judgment as to both the existence and meaning of the contract; however, in doing so, this Court grants great deference to the decision of the highest state court which considered the matter unless that decision is "palpably erroneous" or "manifestly wrong." (*Hale* v. *State Board* 302 U.S. 95, 101 (1937) [82 L.Ed. 72, 76, 585 S.Ct. 102]; *Phelps* v. *Board of Education* 300 U.S. 319, 322-323 (1937) [81 L.Ed. 674, 677, 57 S.Ct. 483].) Only when both the existence of a contract and its terms have been determined by reference to state law, may there be a determination whether a subsequently enacted state law constitutes an impermissible impairment of contract under the federal constitution.

The opinion of the Court of Appeal contains an exhaustive legislative history of the LRL from its inception until the passage of Proposition 57 (Appendix A, pp. 6a-44a). This legislative history reveals that it was not until 1977 when Government Code section 9358 was amended to provide for a continuing appropriation to the LRL and Government Code section 9358.1 was repealed that the Legislature bound the State of California's spending power to fund the LRL (Appendix A, pp. 28a-29a).

The Court of Appeal concluded that the import of this refusal to bind the State to fund the LRL is that, although the petitioners had a right to reasonable or substantial pension benefits, they did not have a vested right to have their pension benefits calculated according to a specific formula (Appendix A, pp. 70a-115a). This latter conclusion was reached only after a thorough and exhaustive review of applicable state authorities. Petitioners have not demonstrated that the decision of the Court of Appeal on their pension benefit rights under California law is palpably erroneous.

2. Petitioners Have Not Overcome the Presumption That They Have No Vested Right in Having Their Retirement Allowance Calculated Pursuant To a Particular Formula.

While it is beyond dispute that a state can, through a statutory scheme, create contractual rights which may not be impaired by subsequent legislation (*Indiana* ex rel. *Anderson* v. *Brand, supra,* 303 U.S. at 100 [82 L.Ed. at 690-691]), in cases litigated under the Contract Clause, it is presumed that a statutory scheme does not create constitutionally protected contract rights. For as this Court has observed, "[t]he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." (*Ibid.*)

Since *it is presumed that a statutory scheme is not intended to create private contractual or vested rights* petitioners as the parties asserting the creation of a contract

with the state had the burden of overcoming that presumption. (*Dodge* v. *Board of Education* 302 U.S. 74, 78-79 (1937) [82 L.Ed. 57, 62, 58 S.Ct. 98].)

Petitioners simply cannot overcome the historical evidence that the California Legislature never intended to bind the spending power of the state to a particular formula for the calculation of their retirement benefits. The inescapable conclusion is that they have failed to meet their burden to overcome the presumption that in enacting the LRL the California Legislature did not intend to grant them private contractual right to have their retirement allowances calculated according to a particular formula.

3. Assuming For Argument's Sake That Petitioners Have Vested Rights That Have Been Impaired, the Alleged Impairment is Not Unconstitutional.

Assuming that petitioners have vested rights protected by the Contract Clause and that Proposition 57 impairs these rights, there is no basis for a finding that Proposition 57 violates the Contract Clause. This Court has determined that not every impairment of a contract violates the contract clause. Thus, "the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' " *City of El Paso* v. *Simmons* 379 U.S. 497 (1965) at p. 515. And "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal

order." (*Home Building & Loan Asso.* v. *Blaisdell* 290 U.S. 398, 435 (1933).)

Assuming petitioners had vested contractual rights to their retirement benefits, Proposition 57 still did not result in an unconstitutional impairment of these rights because it allows them to retain substantial and reasonably foreseeable pension benefits. Proposition 57 only eliminated unforeseen windfall benefits that would have left petitioners with benefits in excess of the salaries of incumbent office holders (see Appendix A, pp. 33a-41a). This does not amount to an unconstitutional impairment of contract rights. *City of El Paso* v. *Simmons, supra,* 379 U.S. at 515.

II

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS

While the constitutional issues presented in the Petition for Certiorari are federal questions in the strict sense, in light of the weight of precedent of this Court, the issues clearly are without merit and insubstantial. Additionally, many of the points raised in the petition do not present this Court with federal questions but instead request this Court to resolve matters of state law contrary to the clear precedent of the California Supreme Court and Court of Appeal.

Since the petition presents this Court with claims that are so attenuated and unsubstantial as to be devoid of merit, this Court should decline to entertain jurisdiction. Cf. *Hagans* v. *Lavine* 415 U.S. 528, 536-37 (1974).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 90-1621

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

VIRGINIA KNIGHT; EDMUND G. BROWN; WILSON RILES; RICHARD NEVINS; HOUSTON I. FLOURNOY; HAROLD J. POWERS,
Petitioners,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondent.

AMICUS CURIAE BRIEF OF ROBERT F. CARLSON AND CHARLES P. VALDES IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI IN ORDER TO PROTECT PENSION RIGHTS OF PUBLIC EMPLOYEES

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BRIEF OF ROBERT F. CARLSON AND CHARLES P. VALDES AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Amicus Curiae are members of Respondent Board of Administration of Public Employees' Retirement System (PERS). Robert F. Carlson is elected from the Retired Members of PERS. He has served on Respondent Board for 20 years, 10 years as president of the Board. He served 33 years with Caltrans as an attorney, his last years as Chief Counsel. In addition, he has been a professor of law at McGeorge School of Law for 15 years. Charles P. Valdes is, and has been, an attorney for Caltrans for the past 24 years. He was elected to the PERS Board from the Total Membership, and was the successful petitioner in the case of *Valdes v. Cory* (1983) 139 Cal.App.3d 773. He has served on the Respondent's Board for eight years and is the Vice-

President of the Board. The PERS Board administers the Legislators' Retirement System (LRS), the Judges' Retirement System (JRS), as well as the Public Employees' Retirement Systems including the statewide systems, and more than 1,160 other public retirement systems by contract.

Both men have followed the two cases now consolidated herein closely as well as other cases involving PERS. They were allowed to file an *Amicus Curiae* Brief in response to the questions posed by the Court of Appeal of the Third Appellate District in its letter of September 27, 1989 (Appendix G of the Petition for Writ, p 240g) and the reply contained in Respondent's Second Supplemental Briefs. As counsel for, and the, Amicus Curiae, they are familiar with the issues raised by the Lower Court's decision. In their

view if the decision of the Appellate Court herein is allowed to stand, the entire field of pension law in California will be destabilized. As elected members of the Respondent's Board, they believe it would be a breach of their fiduciary duty not to ask this Court to grant certiorari and reverse the Lower Court's opinion.

The opinion was originally certified for publication. It was printed in the advance sheets at 223 Cal.App.3d 527 and 273 Cal.Reporter 120. Although decertified for publication by the California Supreme Court, it will be reported in the bound volume of 273 Cal.Reporter 120 and the bound volume of the Pacific Reporter. This widely publicized decision gives a governingbody a radical and creative opportunity to seek to defeat retirement benefits of retirees at the expense of

all the members and retirees of public and private retirement systems with defined benefit plans in California and elsewhere. It will create chaos and a great deal of litigation!

SUMMARY OF ARGUMENT

I. The Supreme Court of California has held repeatedly that public employment does give rise to certain obligations which are protected by the Contract Clause of the Federal Constitution, (Art. I, Sec. 10), including the right to the payment of salary which has been earned and pension benefits. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d. 296, 308-309.) The Legislative Retirement System is a contract between the State and its members, protected from impairment by the Contract Clause. The Lower Court's decision departs radically from

the foregoing law established in California for more than fifty years. It has grafted on a new requirement for a pension benefit to be vested: that the retirement system have a continuing appropriation provision or be fully actuarially funded. This innovative proposition that if the Legislature has failed to enact a valid continuing appropriation provision for retirement benefits, or establish a particular funding mechanism to seek to achieve actuarial funding, then there is no enforceable contract obligation **by retirees** places all members and retirees of public retirement systems in jeopardy.

II. The decision demonstrates a deplorable ignorance of defined benefit retirement systems and their history generally, whether public or private. The LRS is not unique, and the decisional

law applicable to a retiree of LRS is also applicable to a retiree of any defined benefit plans, e.g., the universally cited case of *Betts v. Board of Administration* (1978) 21 Cal.3d 859. (See Petitioners' Appendix H, p. 426h.)

The Respondent Board breached its fiduciary duty as trustee to petitioners as well as members of public retirement systems and retirees generally advocating positions on vesting contrary to statutory law and legal precedent. The Board may now have recognized its obligation to protect its members, and has since re versed its adversary attack on members and retirees' rights, and is advocating members have "vested contractual rights" which cannot be abrogated because they are protected by the Contract Clause in the case of *The Legislature of the State of California, et al. v. March Fong Eu,*

Secretary of State, et al, SO19660, pending in the California Supreme Court.

III. Members of defined benefit plans of public retirement systems in California including the LRS acquire a vested contractual right to the specific formula for the calculation of retirement benefits according to the law during their rendition of service whether the State or other governmental entity funds the system on a pay-as-you-go basis or is fully actuarially funded.

The Lower Court erred in holding the Legislators' Retirement System is unique, and in fact the LRS is very similar to the other state systems. Historically the systems have gone from pay-as-you-go to some form of actuarial funding; the current funding mechanisms of the LRS, State Teachers' Retirement System (STRS), and PERS has improved, but none are fully

funded, and the Judges' Retirement System (JRS) is still on a pay-as-you-go basis. A retiree of a California defined benefit public retirement system, including the Legislators' Retirement System, has acquired a contractual right to a specific formula for the calculation of retirement benefits which cannot be altered or amended without comparable offsetting benefits. A state that fails to meet its pension obligations either through repudiation or failure to appropriate funds has both breached its contract to those with vested pension rights and has violated the Contract Clause of the Federal Constitution.

Amicus Curiae respectfully submit that the authority as set forth by the Lower Court which in effect overrules decisions by the California Supreme Court and impairs vested contractual rights

contrary to decisions of this Court is of such importance that it should be viewed in the light of its application not only to Petitioners in the LRS but also to others in the public retirement systems who would be equally affected. The decision places all retirement benefits in jeopardy. PERS has already cited this opinion in pending cases in opposition to pension rights asserted by employees and retirees, e. g., Walsh v. Board of Adm. of PERS, 3 Civil No. C008704.

ARGUMENT

I. THE LEGISLATIVE RETIREMENT SYSTEM IS A CONTRACT BETWEEN THE STATE AND ITS MEMBERS, PROTECTED FROM IMPAIRMENT BY THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

A. THE CONTRACT CLAUSE PROTECTS RETIREMENT BENEFITS

The Contract Clause of the United States Constitution, Article I, Section 10, provides: "[n]o State shall . . .

pass any . . . Law impairing the Obligation of Contracts . . . ."

Pension rights, unlike other terms of public employment, which are purely statutory, arise from contract and thus are protected from impairment by the Contract Clause. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853; *Carmen v. Alvord* (1982) 31 Cal.3d 318, 325 & n.4 ("Pensions are an obligation of great importance. They help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts.") The California Supreme Court has held the right to a pension to be a fundamental right. *Strumsky v. San Diego County Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 45.

The Contract Clause protects the

"reasonable pension expectations" of members of the LRS, which are defined by the terms of the contract between the State and LRS members. *Home Building & Loan Association v. Blaisdell*, 200 U.S. 398, at 439 (1934). This contract arose when LRS members first began performing services as Constitutional officers. *Miller v. State of California* (1977) 18 Cal.3d 808, 817 ("Upon acceptance of public employment, [one] acquire[s] a vested right to a pension based on the system then in effect." (Emphasis added).

When these retirees accepted their public employment as State officials and voluntarily joined the LRS, the law provided that their basic allowance would be calculated upon the salary of the current incumbent.

B. A CONTRACTUAL PENSION OBLIGATION IMPLIES ADEQUATE FUNDING AND ADMINISTRATION OF THAT PENSION; AND FAILURE OR REFUSAL TO FUND THAT PENSION UNCONSTITUTIONALLY IMPAIRS THE RETIREMENT CONTRACT

The Lower Court misconstrued the case of *Valdes v. Cory* (1983) 139 Cal.App.3d 773. It represented one of the first California court decisions regarding the rights of retirement system members to some certain employer contributions. In *Valdes*, cutbacks in the state's contribution to the Public Employees' Retirement Fund by the Legislature violated an implied contract between public employees and the state, and therefore violated the Contract Clause. Thus in some circumstances the employees may have a vested right to a particular funding mechanism. However, that is just one of their bundle of vested rights. The funding mechanism is not a required element for a vested

contractual right to a pension held out by a retirement system. It is a separate and distinct right. The funding protects the pension.

Another California Appellate opinions also held that adequate funding of pension liabilities are implied terms of pension contracts, the breach of which will violate the Contract Clause. In *California Teachers Ass'n v. Cory* (1984) 155 Cal.App.3d 494, the Legislature had reduced its annual contribution to the State Teachers' Retirement Fund to $1 as a cost saving measure. The California Supreme Court held that the statutorily-established system contractually obliged the state to provide pension benefits, and that there was an implied contractual duty to adequately fund the system. "Pension rights can encompass the funding mechanism for the pension where

there is a palpable element of exchange involving funding [:] continued service as a teacher in return for enhanced assurance that funds to pay the pension benefits will be available at retirement." (Id. at p. 506.) Consequently the Court issued a writ of mandate compelling the state controller to transfer money into the pension fund according to a previously established statutory formula.

The highest court in at least four other jurisdictions have found that a state's pension obligations imply an obligation to provide for the financial soundness of the fund. *In Gaglione v. Levitt* (N.Y. 1975) 337 N.E.2d 592, the Court of Appeals held that legislatively mandating the State Controller to use state employee retirement funds to purchase "MAC" bonds, issued to bail New

York City out of its financial crisis, violated the "impairment" clause of the state constitution. (The clause provides that state employee pension benefits are contractual obligations not to be impaired.) The court reasoned that by removing discretion from the Controller to place pension funds in whatever investment was prudent, the Legislature was jeopardizing the financial soundness of the fund and therefore impairing the pension contract.

Similar reasoning was used by the Washington Supreme Court when it issued a writ of mandate to require the State Controller to continue adequate funding of the Washington State Treachers' Retirement System, after the Governor had sought to reduce contributions from the general fund. *Weaver v. Evans* (1972) 494 P.2d 693. The Pennsylvania

Supreme Court affirmed in large part a writ of mandate to compel defendant city to make contributions to plaintiff/ employee's pension plan so as to make it actuarially sound, as required by the city charter. *Dombrowski v. Philadelphia* (Penn. 1968) 245 A.2d 238. And the Wisconsin Supreme Court has held that use of state teachers' retirement fund money to fund a study of the retirement fund, where the money used was supposed to have been held in reserve to bolster the soundness of the fund, violated the contractual and statutory rights of the fund members. (Wisc. (1960) 106 N.W.2d 301.)

Taken as a whole, these cases hold that states may not repudiate their pension obligations by underfunding or otherwise tampering with the soundness of the fund. A state pensioner faced

with a bankrupt fund would have a contractual right of action against the state--both to sue for his individual benefits, if he is entitled to these at the time of the action, and to enjoin the Legislature from continuing its neglect of the fund. These holdings are in accord with the California *Valdes* and *Cory* cases, cited above, which strongly affirm the contractual nature of the state's pension obligations and which permit alteration of the fund only when reasonable. See *Allen v. City of Long Beach* (1955) 45 Cal.2d 128. To hold otherwise such as the Lower Court's opinion herein will result in the anomoly that states cannot repudiate their pension obligations outright without violating the Contract Clause, but can repudiate them through the back door by failing to provide a specific funding

mechanism or appropriate money for pension funds. Although overlooked by the Lower Court, it must be emphazied that the Legislature has appropriated the funds for these petitioners.

C. LEGISLATURE INTENDED TO BIND ITSELF CONTRACTUALLY TO FUND THE LRS WHEN THE SYSTEM WAS ESTABLISHED

The statement in the Lower Court's opinion that the Legislature disclaimed any intent to bind itself contractually to fund the LRS is unconscionable. (Appendix A, p. 68a of Petition.) It makes a mockery of every employment contract between the State and its employees requiring performance only on the part of the employee. Gone is the mutuality of contract. Our laws apply equally to both parties of the employment contract. By establishing the System, the Legislature obligated the State to fulfill its part of the

employment contract; binding the State in the future exercise of its taxing and spending powers. *Bellus v. City of Eureka* (1968) 69 Cal.2d 336.

Government Code Sec. 9358 as originally enacted provided that the State shall contribute annually to the Legislators' Retirement Fund, an amount calculated to equal the benefits to be paid during the year. The State as the Employer had the obligation to pay retirement benefits as they fell due just as salaries, but it had the discretion to select its funding mechanism. Originally, it chose the system of pay-as-you-go and appropriated adequate funds annually. The LRS is rather unusual because the Legislature in 1977 funded in total the actuarially determined obligation of the LRS which included all the petitioners' accrued

benefits at June 30, 1976. The calculation of their retirement benefits over their lifetimes for the determination of the required amount to fund the actuarial liability was based upon incumbent salaries as payments fall due.

The Lower Court totally ignored the fact that moneys have been appropriated to pay the petitioners' retirement benefits in accordance with the formulae during their rendition of service.

II. THE LRS IS NOT UNIQUE, AND ANY DEFINED BENEFIT SYSTEM MAY BE ADVERSELY AFFECTED BY THE OPINION OF THE APPELLATE COURT

The LRS is administered by the Respondent Board. The Board is required to administer the LRS as if it were governed by the laws that govern the Public Employees' Retirement System. Gov. Code Sec. 9353 provides as follows:

> This system [the LRS] shall be administered by the Board of Administration of the Public

> Employees' Retirement System. **The board shall administer this system in accordance with the provisions of the Public Employees' Retirement Law to the same extent and with the same effect as if those provisions are contained in the Legislators' Retirement Law...** (Emphasis added.)

The LRS is not unique. It is a defined benefit plan with benefits based upon years of service, age, and compensation. It is administered the same as PERS, to the same extent and with the same effect as though the provisions of the Public Employees' Retirement Law were repeated verbatim in the LRL. The statutory law and decisional law with regard to vesting of benefits and any modifications of benefits are the same.

The lower courts' opinion is an aberration from the decisional law laid down by the California Supreme Court which will deleteriously effect vested contractual benefits. Contrary to the

court's opinion, this decision will impact tens of thousands of retirees as well as active employees in public and private systems. The court in an uninformed manner without all the facts sought to differentiate the LRS among the JRS, the State Teachers' Retirement System (commonly known as STRS, not TRS as referred to by the court); and PERS to a limited extent. The Eleventh Annual Report of Financial Transactions Public Retirement Systems for the Calendar Year 1988/Fiscal Year 1988-89 in California includes data and information based on actuarial information and audited financial statements on 5 statewide systems, 20 systems under the County Employees' Retirement Law of 1937, 2 independent county systems, 34 city systems and 57 special district systems; and there are literally hun-

dreds of other public systems in California. The court's opinion does not analyze these other systems and the destruction of vested rights that this decision will cause if governing boards or voters in times of financial stress seek to modify pension benefits of retirees as well as employees based on this opinion.

A. THE RESPONSES AND BRIEFS FILED BY REPONDENT BOARD IN THESE MATTERS HAVE BEEN A BREACH OF FIDUCIARY DUTY TO MEMBERS OF THE RETIREMENT SYSTEMS ITS REPRESENTS

The positions advocated by the Attorney General as the Attorney for Respondent has been a breach of fiduciary duty, e.g., that retirees' benefits were not vested, or that prior to January 1, 1978, the Legislature had not irrevocably committed California's taxing and spending powers to funding the Legislature's Retirement Fund.

These positions were contrary to the law as it has been applied and represented by PERS to its members in accordance with decisions such as *Betts*. The adversary advocacy in order to "win" the case is contrary to the Board's Fiduciary obligations which have been enunciated in *Hittle v. Santa Barbara County Employees Retirement Assn* (1985) 39 Cal.3d 374.

Congress has been seeking to extend ERISA's fiduciary standards to the public sector, and an adverse decision in this case gives impetus to this movement. The Lower Court's decision herein must be reversed by this Court if public members and retirees are to be protected presently. Now the control of public retirement systems is clearly in the hands of the employer. The result is a bifurcation of responsibility in

the administration of public retirement systems that stand clearly in direct conflict with ERISA which protects employees in private retirement systems. The basic conflict evolves when the public employer fails to recognize the interest of the pension system members and their beneficiaries as being paramount, with the operation and management of the retirement systems accomplished solely in and for their interests.

The arguments advanced in Respondent's Second Supplemental Brief answering the Lower Court's questions is contrary to the interest of pension system members and their beneficiaries of California public retirement systems and a direct conflict of interest. Under the theory advanced, the retirees of all systems who served during the period of pay-as-you-go financing could

have their pension benefits substantially reduced by the Legislature's failure to fund them. Since none of the State systems are fully actuarially funded, would any pension benefit be secure? No, all would be in jeopardy!

It is noteworthy that after the Board's attention has been drawn to the fiduciary duty they owe as trustees to members and retirees, Respondent has taken the opposite position in the pending case of The Legislature of the State of California, et al. v. March Fong Eu, Secretary of State, in the California Supreme Court, No. SO19660. Their brief recognizes that prior to the passage of Proposition 140, on November 6, 1990, affecting members' LRS pension benefits, effective on November 7, 1990, LRS members had vested rights to earn benefits under the terms set

forth in the LRS. For example, on page 11 of the Return of Respondent Board of PERS to Alternative Writ of Mandate dated April 16, 1991, is the following:

> C. LRS Members as of November 6, 1990 had a Vested Right to Earn Benefits under the Terms set Forth in the LRS
>
> 1. Pension Benefits Vest Before They Are Earned
>
> **III. RETIREES' ACQUIRED CONTRACTUAL RIGHTS TO A SPECIFIC FORMULA FOR THE CALCULATION OF THEIR BASIC RETIREMENT BENEFITS BASED UPON THE FLUCTUATING FORMULA TIED TO INCUMBENT SALARIES WHICH CANNOT BE IMPAIRED**

The California law is set forth in the California Supreme Court's decision of *Olson v. Cory* (1980) 27 Cal.3d 532; 540-541:

> "A long line of this court's decisions has reiterated the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment. (*Betts v. Board of Administration, supra,* 21 Cal.3d 939; *Kern v. City of*

> *Long Beach, supra*, 29 Cal.2d 848, 852-853.) In *Betts*, this court held that a former state treasurer who had served in that office from 1959 to 1967 was entitled to a pension on the basis of the law in effect at the time of his termination rather than the modified law in effect at the time of his application for pension benefits in 1976. . ."
>
> "'An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.' (*Betts v. Board of Administration, supra*, 21 Cal. 3d 859, 866.)'

The Supreme Court concluded in *Betts,Id,* at p. 867-868 that an amendment enacted after he had left office which purported to convert a fluctuating basic pension allowance to a fixed allowance "could not constitutionally be applied to petitioner because the amendment withdrew benefits to which he earned a vested contract while employed. No 'comparable

new advantages' to petitioner appear in the plan which can offset the detriment he has suffered by replacement of a 'fluctuating' system of benefit computation with a 'fixed' system." The Lower Court herein should have reached the identical results.

Members of public retirement systems are to have their retirement allowances calculated according to the formula in place during their rendition of service and this formula cannot be altered or amended to their detriment after their retirement without violating the Contract Clause of the federal Constitution irrespective of the funding mechanism selected by the employer.

A. THE DIMUNITION OF A RETIREMENT ALLOWANCE BY AMENDING A RETIREES' FORMULA FOR THE CALCULATION OF RETIREMENT BENEFITS IS CONTRARY TO THE PUBLIC POLICY AND PURPOSE OF CALIFORNIA'S RETIREMENT LAWS

One of the primary objectives in providing pensions for public employees is to induce competent persons to enter and remain in public employment. *Bilyeu v. State Employees' Retirement System* (1962) 58 Cal.2d 618 at p. 623. In *Knight v. Board of Administration of the State Employees' Retirement System* (1948) 32 Cal.2d 400, 405, the Court said:

> "One of the purposes of a retirement system is an inducement which will enable the government to secure and retain more qualified government personnel. That purpose is more important in the case of officers than ordinary employees when we consider the more important functions they perform."

In one of California's leading cases the Court said in *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855, 856:

> ". . .[T]he mere fact that performance is in whole or in part dependent upon certain

> contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it connot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights.
>
> "[To] hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employments." [Citations omitted]. . "It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits, and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary." [Citations omitted.]

Elective officers who are members of a retirement plan have the same

constitutional protection against impairment of retirement benefits as do lesser employees. Such benefits as are earned by an elective officer cannot be taken away from him.

What a cruel hoax it would be if the State or any public employer could deny full pension rights earned and vested by failing to fund them or failing to provide a particular funding mechanism. Obviously, such a result shatters public policy and retirement provisions will be ineffective to induce qualified people into public service, and remain there, or they will have become a snare for the unwary as described in *KERN*.

CONCLUSION

This Court has long recognized the special nature and importance of pension rights, particularly in cases where

State law has held them vested, contractual rights. Your Court has subjected attempts to impair them to careful scrutiny under the Contract Clause. Application of that careful scrutiny and review of the Lower Court's opinion herein freed of political ramifications will disclose a violation of the Contract Clause of the federal Constitutuion. Proposition 57 directly and severely impairs the vested pension rights of Constitutional officers who were first elected prior to March 4, 1972, or their surviving beneficiaries. As long as the opinion herein is not reversed, all retirement benefits of public employees and retirees are in jeopardy. Accordingly, Amicus Curiae respectfully requests the Court to protect vested rights threatened by the Opinion rendered by the Lower Court as

it has protected such rights in the past. For the reasons stated, grant the petition for a writ of certiorari to the Court of Appeal of the State of California in and for the Third Appellate District. The judgment must be reversed.

DATED: June 3, 1991.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 90-1621

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

VIRGINIA KNIGHT; EDMUND G. BROWN; WILSON RILES; RICHARD NEVINS; HOUSTON I. FLOURNOY; HAROLD J. POWERS,
Petitioners,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply brief in support of their petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

CERTIORARI SHOULD BE GRANTED BECAUSE ARTICLE III, SECTION 7 (PROPOSITION 57) VIOLATES THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION

Petitioners contend that Proposition 57 enacted November 5, 1986, cannot constitutionally be applied to them, because the amendment withdraws benefits to which they earned a vested contractual right during their rendition of service. No comparable new advantages are included in the amendment which could offset the detriment they have suffered by replacement of a "fluctuating" system of benefit computation with a "fixed" system. They are therefore entitled to have their

basic retirement allowance computed on the basis of section 9359.1 as it read when they accepted their employment. Under the formula therein provided, petitioners' basic pension benefit is to be determined periodically on the basis of the current incumbent's salary.

1. THE DECISION OF THE LOWER COURT THAT RETIREES DO NOT HAVE A VESTED RIGHT TO THE RETIREMENT ALLOWANCE CALCULATED PURSUANT TO THE PARTICULAR FORMULA DURING THEIR RENDITION OF SERVICE IS PALPABLY ERRONEOUS AND MANIFESTLY WRONG

The decision of the Lower Court is riddled with inaccuracies, mistakes of fact and endless supposition which are not supported by any evidence filed with the Court. The September 27, 1989, letter to counsel requesting supplemental briefing is contained in Petitioners' Petition, Appendix G, 240g, 244g. The Court attempted to show the virtually unique character of the LRS, and claimed

the Legislature had expressly refused to appropriate funds to support the LRL. These assertions by the Court, and repeated by the Respondent, is contrary to fact and legal precedent. (See *Betts v. Board of Administration* 21 Cal.3d 939, Appendix H, 246h.)

The LRS is a defined benefit plan. The Contract Clause protects the "reasonable pension expectations" of members of the LRS, which are defined by the terms of the contract between the State and LRS members set forth in the LRS. This contract arose when members first began performing services as Constitutional officers. *Miller v. State of California* (1977) 18 Cal.3d 808, 817 ("upon acceptance of public employment, [one] acquire[s] a vested right to a pension based on the system then in effect.") (emphasis added).

Identifying the rights that vested in LRS members on their acceptance of employment, we find Sec. 9359.1(b) provided a basic retirement allowance based upon the salary of the incumbent office holder. The State made two types of promises to LRS members: First, it promised members that so long as they continued to serve and make the required contributions, they could earn the right to benefits payable in the future. Second, after members satisfied the service and contribution requirements of the LRS, the State promised them that upon retirement the benefits earned would be paid in full. See *City of Long Beach v. Allen* 143 Cal.App.2d 35, 38-39 (fully earned pension may not be changed to recipient's detriment).

The foregoing description of a LRS contract with a member is the argument

now advanced by Respondent in the pending case of *Legislature of the State of California, et al. v. March Fong Eu, Secretary of State, et al,* S019660 (1991). Respondent is taking the opposite position in the above matter to the arguments advanced herein as discussed briefly in the Brief of the Amicus Curiae.

The history of the LRS and other defined benefit plans under the State of California is correctly set forth in the comprehensive Report to Senate Committee on Public Employment and Retirement: California Public Retirement Plans, Volume I, An Overview of Plans and Comparisons, Volume 1, Bill Horne Associates (1978). The LRS is treated the same as all other defined benefit plans established by the Legislature. It points out that under the laws and decisions in

California, employees currently on the payroll are assured of receiving all pension benefits adopted to date, regardless of any future financial or other contingency that may be encountered by the public agency employer. At p. 44, the study observes:

> ". . . By law or legal precedent, **a formula for pension benefits once granted to a specific employee cannot be reduced.** A pension plan's commitment may extend in a few cases for nearly 100 years, from the point of employment to the death of the last survivor deriving benefits from the employee's membership in the system. . . " (Emphasis added.)

Historically, the LRS is neither unique nor has the Legislature refused to honor its legal obligation to fund the system as payments fell due.

2. WHEN PETITIONERS' CONTRACT OF EMPLOYMENT IS CONSTRUED ACCORDING TO ITS "JUST AND REASONABLE PURPORT", THEIR VESTED BASIC RETIREMENT ALLOWANCE IS CALCULATED UPON THE INCUMBENTS' COMPENSATION

Section 9359 specifically provided that any member credited with four or more years of service, "shall be retired and thereafter shall receive for life the retirement allowance provided in this chapter."

Any public official could and would reasonably expect that when he or she retired, the basic retirement allowance would be calculated based upon the current compensation of the incumbent.

3. THE CONTRACT CLAUSE SHOULD NOT BE CONSTRUED TO "PERMIT THE STATE TO ADOPT AS ITS POLICY THE REPUDIATION OF DEBTS OR DESTRUCTION OF CONTRACTS OR THE DENIAL OF MEANS TO ENFORCE THEM"

The arguments advanced by the Lower Court herein are radical innovations to permit the State to repudiate the debt owed to the petitioners. They will permit other public agencies means to seek to deprive public employees and

retirees their promised benefits violating the Contract Clause of the United States.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE PETITION PRESENTS SUBSTANTIAL FEDERAL QUESTIONS OF GREAT CONCERN TO PUBLIC EMPLOYEES EVERYWHERE

Congress has shown its concern for the pension rights of private employees by the enactment of ERISA. As was said in *Nachman Corp. v. Pension Benefit Guar. Corp.* (1980) 446 U.S. 359:

> "On September 2, 1974, following almost a decade of studying the Nation's private pension plans, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S. C. Sec. 1001 et seq. As a predicate for this comprehensive and reticulated statute, Congress made detailed findings which recited in part, 'that the continued well-being and security of millions of employees and their dependents are directly affected by these plans.
>
> "One of Congress' central

> purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated. Congress found 'that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.' ERISA Sec. 2(a), 88 Stat. 832, 29 U.S.C. Sec. 1001 (a). **Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it.** (*Id.* at 374-375.) (Emphasis added.)

And quoting from your honorable Court in *Firestone Tire & Rubber Co. v. Bruch* (1989) 489 U.S. 101:

> "ERISA was enacted `to promote the interests of employees and their beneficiaries in employee benefit plans.' *Shaw v. Delta Airlines, Inc.*

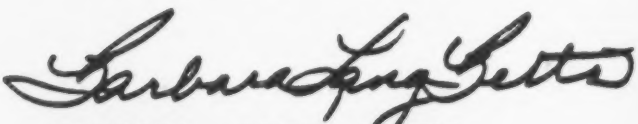
> 463 U.S. 85, 90 (1983), and 'to protect contractually defined benefits.' *Massachusetts Mutual Life Insurance Co. et al. v. Russell* (1985) 473 U.S. at 148. See generally 29 U.S.C. Sec. 1001 (setting forth congressional findings and declarations of policy regarding ERISA). (*Id.* at 113.)

Clearly, in light of Congress' stated intention to protect private employees' rights to their defined benefits, and this Court's emphasis on the protection of pension rights, substantial federal questions are presented in the Petition. The need to protect the security of public employees and officials to their defined benefit rights is equal to the need to protect private employees. This Court has the opportunity to preserve and protect public retirees' pension rights by granting certiorari and reversing the opinion of the Lower Court.

CONCLUSION

For the foregoing reasons, as well as those included in the Petition and Brief of Amicus Curiae, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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